

Cause No. 10-0324

---

IN THE  
SUPREME COURT OF TEXAS

---

Leslie Durio Pool, Joe Pool, Jr., and Peter E. Ferraro  
*Petitioners,*

v.

Danae Durio Diana,  
*Respondent*

---

*On Appeal from the Third Court of Appeals,  
Austin, Texas*

---

**PETITION FOR REVIEW**

---

Joe Pool, Jr.  
State Bar No. 16116400  
3800 Creek Road  
Dripping Springs, Texas 78620  
(512) 894-4300  
*Attorney for Petitioners*

## **IDENTITY OF PARTIES AND COUNSEL**

### **Petitioners**

Leslie Durio Pool

Peter E. Ferraro

Joe Pool, Jr.

Petitioners' Supreme Court counsel:

Joe Pool, Jr.  
State Bar No. 16116400  
3800 Creek Road  
Dripping Springs, Texas 78620  
(512) 894-4300  
(512) 233-2862 fax

Petitioners' counsel in the courts below:

Peter E. Ferraro State Bar No. 06934600 The Ferraro Law Firm 1011 W. 10 <sup>th</sup> Street Austin, Texas 78703 (512) 474-7742 (512) 474-8106 fax	(trial court and court of appeals)
--	------------------------------------

Joe Pool, Jr. (Information provided above)	(trial court only <sup>1</sup> )
---	----------------------------------

---

<sup>1</sup> Mr. Pool officially withdrew from representing Mrs. Pool in the trial court on July 30, 2007, but reappeared in the case on Mrs. Pool's behalf by signing and filing a document on March 6, 2008. *See* 2 CR 423; 5 CR 1436, 1441.

**Respondent**

Danae Durio Diana

Respondent's appellate counsel:

Tracy Willi  
State Bar No. 00784633  
Willi Law Firm, PC  
10916 Palgrave Court  
Austin, Texas 78739-1784  
(512) 288-3200  
(512) 288-3202 fax

Respondent's trial counsel:

Brian T. Thompson  
State Bar No. 24051425  
McGinnis, Lochridge & Kilgore, LLP  
600 Congress Avenue, Suite 2100  
Austin, Texas 78701  
(512) 495-6000  
(512) 495-6093

Scott Baker<sup>2</sup>  
State Bar No. 00793296  
Yates Law Firm LLC  
1900 Wazee Street, Suite 203  
Denver, Colorado 80202  
(303) 722-2810

---

<sup>2</sup> Mr. Baker was formerly with McGinnis, Lochridge & Kilgore, LLP., in Austin, Texas.

## **TABLE OF CONTENTS**

Identities of Parties and Counsel .....	ii
Table of Contents .....	iv
Index of Authorities.....	v
Statement of the Case .....	vii
Statement of Jurisdiction .....	viii
Issues Presented.....	ix
Introduction .....	1
Statement of Facts .....	2
Argument.....	3
1. \$40,000 Sanction for the Testamentary Capacity and Undue Influence Claims .....	3
2. \$30,000 Sanction for the Acreage Claim.....	10
3. \$20,000 Sanction for the Forgery and Lack of Formalities Claims.....	12
Prayer.....	16
Appendix A – Probate Court’s Modified Final Judgment (April 21, 2008)	
Appendix B – Third Court of Appeals Memorandum Opinion (March 24, 2010)	
Appendix C – Third Court of Appeals Judgment (March 24, 2010)	

## **INDEX OF AUTHORITIES**

### **Cases**

<i>Albertson's Inc. v. Sinclair</i> , 984 S.W.2d 958 (Tex. 1999) .....	9
<i>Bettis v. Bettis</i> , 518 S.W.2d 396 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.).....	7
<i>Brewer v. Foreman</i> , 362 S.W.2d 350 (Tex. Civ. App.—Houston 1962, no writ) .....	7
<i>Cire v. Cummings</i> , 134 S.W.3d 835 (Tex. 2004) .....	9
<i>Continental Airlines, Inc. v. Kiefer</i> , 920 S.W.2d 274, 277 (Tex. 1996).....	viii
<i>Croucher v. Croucher</i> , 650 S.W.2d 55 (Tex. 1983).....	7
<i>Dominguez v. Duran</i> , 540 S.W.2d 567 (Tex. Civ. App.—Houston [1 <sup>st</sup> Dist.] 1976, writ ref'd n.r.e.).....	6
<i>Gayle v. Dixon</i> , 583 S.W.2d 648 (Tex. Civ. App.—Houston [1 <sup>st</sup> Dist.] 1979, writ ref'd n.r.e.).....	6
<i>GTE Communications v. Tanner</i> , 856 S.W.2d 725 (Tex. 1993) .....	4
<i>Hawkins v. Estate of Volkmann</i> , 898 S.W.2d 334 (Tex. App.—San Antonio 1994, writ denied) .....	7
<i>Horton v. Horton</i> , 965 S.W.2d 78 (Tex. App.—Fort Worth 1998, no pet.).....	7
<i>Huffman v. Huffman</i> , 339 S.W.2d 885 (Tex. 1960) .....	14
<i>In re Estate of Graham</i> , 69 S.W.3d 598 (Tex. App.—Corpus Christi 2001, no pet.).....	7
<i>Low v. Henry</i> , 221 S.W.3d 609 (Tex. 2007) .....	5
<i>Luxenberg v. Marshall</i> , 835 S.W.2d 136 (Tex. App.—Dallas 1992, no writ) .....	9
<i>Mattly v. Spiegel, Inc.</i> , 19 S.W.3d 890 (Tex. App.—Houston [14th Dist.] 2000, no pet.) .....	9
<i>Monroe v. Grider</i> , 884 S.W.2d 811 (Tex. App.—Dallas 1994, writ denied).....	5, 11, 12

<i>Pickelner v. Adler</i> , 229 S.W.3d 516 (Tex. App.—Houston [1 <sup>st</sup> Dist.] 2007, pet. denied) .....	12
<i>Pool v. Diana</i> , 2010 WL 1170234 (Tex. App.—Austin, March 24, 2010, pet. filed) .....	vii
<i>Pope v. Garrett</i> , 211 S.W.2d 559 (Tex. 1948) .....	12
<i>Rankin v. Naftalis</i> , 557 S.W.2d 940 (Tex. 1977) .....	12
<i>San Antonio Area Foundation v. Lang</i> , 35 S.W.3d 636 (Tex. 2000) .....	14
<i>Seydler v. Baumgarten</i> 294 S.W.2d 467 (Tex. Civ. App.—Galveston 1956, writ ref'd n.r.e.).....	15
<i>Steger v. Muenster Drilling Co.</i> , 134 S.W.3d 359 (Tex. App.—Fort Worth 2003, pet. denied) .....	14
<i>Tarrant County v. Chancey</i> , 942 S.W.2d 151 (Tex. App.—Fort Worth 1997, no writ) .....	9
<i>Watkins v. Pearson</i> , 795 S.W.2d 257 (Tex. App.—Houston [14th Dist] 1990, writ denied) .....	9

### **Statutes**

TEX. CIV. PRAC. & REM. CODE Ch. 10 .....	x
TEX. GOV'T CODE § 22.001(a)(1) .....	viii
TEX. GOV'T CODE § 22.001(a)(6) .....	viii
TEX. PENAL CODE § 32.21(a)(1) .....	13
TEX. PROB. CODE § 10B .....	8
TEX. PROB. CODE § 59A.....	11, 12

### **Rules**

TEX. R. APP. P. ....	xi, 3
TEX. R. CIV. P. 13 .....	x, 3, 4, 5, 7, 9

## **STATEMENT OF THE CASE**

**Nature of the Case:** This is a will contest case that ultimately resulted in \$139,500 in sanctions being imposed on Petitioners by the trial and appellate courts.

**Trial Court and Judge:** Travis County Probate Court No. 1, the Honorable Guy Herman presiding.

**Trial Court Disposition:** Leslie Durio Pool challenged the probate of a will purportedly made by her father, Donn Leslie Duiro. Leslie's challenges to the probate of the will were rejected by the trial court through a series of summary judgments that were incorporated into a final judgment signed April 2, 2008.<sup>3</sup> Then the trial court conducted a hearing that concluded with the imposition of substantial sanctions against Leslie and her attorneys that were incorporated into a modified final judgment, signed April 21, 2008.<sup>4</sup>

**Parties in Court of Appeals:** Leslie Durio Pool, Peter E. Ferraro, and Joe Pool, Jr., appellants.<sup>5</sup> Danae Durio Diana, appellee.

**Court of Appeals:** Third Court of Appeals, Austin, Texas.

**Justices Participating in the Decision:** Justices Patterson, Pemberton, and Waldrop. Opinion by Justice Pemberton. Concurring and dissenting opinion by Justice Patterson.

**Citation to Court of Appeals Opinion:** *Pool v. Diana*, 2010 WL 1170234 (Tex. App.—Austin, March 24, 2010, pet. filed) (unpublished memo. op.).<sup>6</sup>

---

<sup>3</sup> 5 CR 1659.

<sup>4</sup> 5 CR 1714. App. A.

<sup>5</sup> Only Leslie Durio Pool was listed on the cover of the Appellant's Brief as an appellant, but the issues presented, argument, and prayer all sought relief from the trial court's judgment on behalf of Leslie and both of her attorneys.

<sup>6</sup> App. B.

**Disposition by Court of Appeals:** The court of appeals affirmed the trial court’s judgment and, over Justice Patterson’s dissent, added an additional \$30,000 in “penalties” against Leslie under Texas Rule of Appellate Procedure 45.<sup>7</sup>

### **STATEMENT OF JURISDICTION**

This is an appeal from a trial court’s final judgment. This court has jurisdiction under Texas Government Code section 22.001(a)(1), because the justices on the court of appeals disagreed on a question of law material to the decision. *See* TEX. GOV’T CODE § 22.001(a)(1). Specifically, Justice Patterson disagreed with the panel’s majority on whether Texas Rule of Appellate Procedure 45 allowed the imposition of \$30,000 of “penalties” in this case.

This court also has jurisdiction under Texas Government Code section 22.001(a)(6), because errors of law of importance to the state’s jurisprudence have been committed by the court of appeals. *See* TEX. GOV’T CODE § 22.001(a)(6). Some of these errors of law are more fully explained in the body of this document.

---

<sup>7</sup> The opening paragraph of the court of appeals’ opinion states that the court “is granting a motion for penalties against Ms. Pool and her counsel.” *Pool v. Diana*, Memo Op. at 1 (emphasis added) (App. B). At the end of the opinion, the court states that Danae Diana “has requested penalties in the amount of \$30,000 against Leslie and her counsel.” *Id.* at 27. The opinion further states that the is “grant[ing] Danae’s motion for penalties.” *Id.* at 28. The court of appeals’ judgment, however, states that it is “ordered that appellant pay penalties in the amount of \$30,000” without mentioning Mrs. Pool’s attorneys. *See* App. C. The only appellant named in the court of appeals’ style of the case, as reflected on its opinion, is Leslie Durio Pool. Because the judgment controls over the opinion (*Continental Airlines, Inc. v. Kiefer*, 920 S.W.2d 274, 277 (Tex. 1996)), it appears that the \$30,000 penalty is imposed against Leslie Pool alone.



## **ISSUES PRESENTED**

**Issue One:** Did the court of appeals err in affirming the trial court's exclusion of summary judgment evidence offered by Leslie Pool on her testamentary capacity claim<sup>8</sup> and on her claim for imposition of a resulting or constructive trust as to certain property (the "15 Acres") titled in the name of Donn Durio?<sup>9</sup> **(Unbriefed Issue)**

**Issue Two:** Did the court of appeals err in affirming the trial court's summary judgment against Leslie Pool in regard to her claim that Donn Duiro lacked testamentary capacity when he signed his will?<sup>10</sup> **(Unbriefed Issue)**

**Issue Three:** Did the court of appeals err in affirming the trial court's summary judgment against Leslie Pool on her claim that Donn Durio held certain property (the "15 Acres") on her and her sister's behalf by virtue of a resulting or constructive trust?<sup>11</sup> **(Unbriefed Issue)**

**Issue Four:** Did the court of appeals err in affirming the trial court's summary judgment against Leslie Pool in regard to her claims that Donn Duiro's will was a forgery and failed to comply with formalities?<sup>12</sup> **(Unbriefed Issue)**

**Issue Five:** Did the court of appeals err in affirming the trial court's granting of sanctions against Leslie Pool and Joe Pool in the sum of \$2,500 in connection with Leslie Pool's Motion to Compel Discovery?<sup>13</sup> **(Unbriefed Issue)**

**Issue Six:** Did the court of appeals err in affirming the trial court's granting of sanctions against Leslie Pool and Joe Pool in the sum of \$1,500 in connection with Leslie Pool's Motion to Set Aside Sanctions?<sup>14</sup> **(Unbriefed Issue)**

**Issue Seven:** Did the court of appeals err in affirming the trial court's granting of sanctions against Leslie Pool and Joe Pool in the sum of \$1,000 for Leslie Pool's failure to dismiss Stephen Iler from the case?<sup>15</sup> **(Unbriefed Issue)**

**Issue Eight:** Did the court of appeals err in affirming the trial court's granting of sanctions against Leslie Pool and Joe Pool in the sum of \$2,500 in connection with Leslie Pool serving discovery requests on Stephen Iler?<sup>16</sup> **(Unbriefed Issue)**

---

<sup>8</sup> 4 CR 910; 5 CR 1733.

<sup>9</sup> 4 CR 915; 5 CR 1733.

<sup>10</sup> 4 CR 921; 5 CR 1715, 1733.

<sup>11</sup> 4 CR 922; 5 CR 1715, 1733.

<sup>12</sup> 5 CR 1647; 5 CR 1733.

<sup>13</sup> 2 CR 342.

<sup>14</sup> 2 CR 401.

<sup>15</sup> 4 CR 1089.

**Issue Nine:** Did the court of appeals err in affirming the trial court's granting of sanctions under Texas Rule of Civil Procedure 13 against Leslie Pool and Joe Pool in the sum of \$40,000 on the grounds that Leslie Pool maintained her lack of testamentary capacity and undue influence claims in bad faith?<sup>17</sup>

**Issue Ten:** Did the court of appeals err in affirming the trial court's granting of sanctions under Texas Civil Practice and Remedies Code Chapter 10 against Joe Pool in the sum of \$30,000 on the grounds that he signed, filed, and maintained Leslie Pool's claim to the 15 Acres in the first amended petition contesting the will when it was not warranted by existing law or by an argument for the extension, modification, or reversal of existing law?<sup>18</sup>

**Issue Eleven:** Did the court of appeals err in affirming the trial court's granting of sanctions under Texas Rule of Civil Procedure 13 against Peter Ferraro in the sum of \$1,000 on the ground that he maintained Leslie Pool's defamation claim in bad faith and for purposes of harassment in the second amended petition contesting the will?<sup>19</sup>  
**(Unbriefed Issue)**

**Issue Twelve:** Did the court of appeals err in affirming the trial court's granting of sanctions under Texas Rule of Civil Procedure 13 against Leslie Pool in the sum of \$6,000 on the ground that she maintained her defamation claim in bad faith and for purpose of harassment in her second amended petition contesting the will?<sup>20</sup> **(Unbriefed Issue)**

**Issue Thirteen:** Did the court of appeals err in affirming the trial court's granting of sanctions under Texas Rule of Civil Procedure 13 against Leslie Pool and Joe Pool in the sum of \$20,000 on the grounds that Leslie Pool maintained her forgery and lack of formalities claims in bad faith?<sup>21</sup>

**Issue Fourteen:** Did the court of appeals err in affirming the trial court's granting of sanctions under Texas Rule of Civil Procedure 13 and Texas Civil Practice and Remedies Code Chapter 10 against Leslie Pool and Joe Pool in the sum of \$5,000 in connection with the signing and filing of the March 6, 2008, response to motion for summary judgment, which incorporated by reference affidavits by Michael Evans and Richard Chilleri?<sup>22</sup> **(Unbriefed Issue)**

---

<sup>16</sup> 4 CR 1090.

<sup>17</sup> 5 CR 1714, 1719-23, ¶¶ 6-17.

<sup>18</sup> 5 CR 1714, 1723-25, ¶¶ 18-27.

<sup>19</sup> 5 CR 1714, 1725-27, ¶¶ 28-37.

<sup>20</sup> 5 CR 1714, 1725-27, ¶¶ 28-37.

<sup>21</sup> 5 CR 1714, 1727-30, ¶¶ 38-47.

<sup>22</sup> 5 CR 1714, 1730-32, ¶¶ 48-53.

**Issue Fifteen:** Did the court of appeals err in imposing “penalties” under Texas Rule of Appellate Procedure 45 against Leslie Pool “for continuing to pursue her groundless claims.”<sup>23</sup> **(Unbriefed Issue)**

---

<sup>23</sup> See App. C (judgment for penalties against Leslie Durio Pool alone).

Cause No. 10-0324

---

IN THE  
SUPREME COURT OF TEXAS

---

Leslie Durio Pool, Joe Pool, Jr., and Peter E. Ferraro  
*Petitioners,*

v.

Danae Durio Diana,  
*Respondent*

---

*On Appeal from the Third Court of Appeals,  
Austin, Texas*

---

**PETITION FOR REVIEW**

---

TO THE HONORABLE SUPREME COURT OF TEXAS:

Petitioners Leslie Durio Pool, Peter E. Ferraro, and Joe Pool, Jr., respectfully ask this Court to reverse the court of appeals' judgment, which erroneously affirmed the trial court's rejection of Leslie's contest to a will purportedly executed by her father, erroneously affirmed the trial court's imposition of substantial monetary sanctions against Leslie and her lawyers, and erroneously imposed additional penalties against Leslie.

## **INTRODUCTION**

This is an appeal from a will contest, where the trial and appellate courts both have imposed substantial sanctions (totaling \$139,500) against the contestant, Leslie Durio Pool, and her two attorneys. In regard to the merits of the case, Leslie non-suited one claim and a pseudo-claim; and the trial court disposed of Leslie's other four claims through three summary judgment orders. In pretrial proceedings, the trial court assessed four sanctions, totaling \$7,500, against Leslie and/or one of her attorneys. After the final judgment was signed, the trial court assessed six additional sanctions, totaling \$102,000, against Leslie and/or one of her attorneys. Then, on appeal, the court of appeals assessed an additional monetary penalty of \$30,000 against Leslie.<sup>24</sup>

Consequently, the Petitioners must address the merits of four summary judgments (covering five causes of action), ten separate assessments of sanctions by the trial court, and the assessment of a penalty by the court of appeals. It cannot be done in a 15-page petition for review. Petitioners, therefore, will focus in this document on the post-trial sanctions imposed by the trial court, leaving the other matters for their brief on the merits, if allowed.

In the end, Petitioners request only that the Court allow briefing on the merits so that they may have a full and fair opportunity to explain the merits of the case, to rebut the allegations of misconduct, and to explain why the courts below erred in imposing a crippling amount of sanctions—\$139,500—against them.

---

<sup>24</sup> See note 7, *supra*.

## **STATEMENT OF FACTS**

Donn Durio died on September 29, 2006, at age 72.<sup>25</sup> At the time of his death, Donn was married to Marianne, his third wife, to whom he had been married for 22 years.<sup>26</sup> Donn and Marianne did not have children together. Donn was the father of two children (Danae Durio Diana and Leslie Durio Pool), both by his first wife, Helen. Donn had two grandchildren, Leslie's sons Trey and Trent Pool. Marianne had four children from a prior marriage, the youngest being Stephen Iler.

On November 21, 2006, Danae filed an application to probate the Last Will and Testament of Donn Leslie Durio, purportedly executed on June 16, 1994.<sup>27</sup> About three weeks later, on December 11, 2006, Leslie filed an objection and opposition to probate of the will.<sup>28</sup> Leslie was represented by her husband, Joe Pool, who is an attorney.<sup>29</sup> Joe filed a first amended petition on Leslie's behalf on March 6, 2007.<sup>30</sup> On April 12, 2007, Peter Ferraro appeared at Leslie's deposition as her attorney, thus joining Joe as Leslie's counsel in the case.<sup>31</sup> Joe formally withdrew as Leslie's attorney on July 30, 2007.<sup>32</sup>

Leslie's substantive claims ultimately were resolved by her non-suiting a claim and a pseudo-claim,<sup>33</sup> and the trial court entering summary judgments against her on the

---

<sup>25</sup> See 1 CR 16.

<sup>26</sup> See 1 CR 3, ¶8.

<sup>27</sup> 1 CR 2 (application to probate); 1 CR 11 (copy of will). Danae was named as co-executor of the will, along with Linda Joanne Buffington. See 1 CR 11. Buffington waived her right to be named co-executor. 1 CR 7.

<sup>28</sup> 1 CR 19.

<sup>29</sup> See 1 CR 23.

<sup>30</sup> 1 CR 28.

<sup>31</sup> 2 RR (4/11/08) 36; 4 RR (4/15/08) 7-8.

<sup>32</sup> 2 CR 423.

<sup>33</sup> See 4 CR 894 (second amended petition omits undue influence claim); 4 CR 1086 (non-suit order for undue influence claim); 5 CR 1434 (non-suit order for defamation claim). Leslie did not actually state a claim for defamation or disparagement, but included in her second amended petition several paragraphs discussing these topics. 4 CR 894, 896. Danae's attorneys treated it as a cause of action and moved for summary judgment on the "claims." 4 CR 1106. Leslie then non-suited this pseudo-claim in open court. See 5 CR 1434. Ultimately, Leslie was

others.<sup>34</sup> In the final days of the case, Danae filed a motion seeking sanctions against Leslie and her lawyers of “no less than \$200,000” under Civil Practice and Remedies Code Chapter 10 and Civil Procedure Rule 13.<sup>35</sup> The trial court granted the motion, imposing sanctions totaling \$102,000 against Leslie and/or one of her attorneys. When these sanctions are added to the \$7,500 pre-judgment sanctions imposed by the trial court, the total amount of trial-level sanctions is \$109,500. The court of appeals then added \$30,000 as penalties assessed under Appellate Procedure 45. Because of page limitations, this petition will focus only on the trial court’s post-judgment sanctions.

### **ARGUMENT**

#### **1. \$40,000 Sanction for the Testamentary Capacity and Undue Influence Claims**

The trial court sanctioned Leslie and Joe \$40,000 under Rule 13 for maintaining groundless claims in bad faith that Donn lacked testamentary capacity when he signed the will and that he was unduly influenced to execute the will.<sup>36</sup> The order states: “While arguably Ms. Pool’s original will contest and first amended will contest that alleged the Capacity and Undue Influence Claims are groundless, *ab initio*, the Court does not make such a finding. However, the court does find these two claims groundless from the point that the depositions of Leslie Pool and Joe Pool were concluded on April 13, 2007.”<sup>37</sup> Joe Pool signed the original petition and the first amended petition, but both of those

---

sanctioned for bring a “defamation claim” she never actually brought. *See* 5 CR 1725-27, ¶¶ 28-37.

<sup>34</sup> 4 CR 921; 4 CR 922; 5 CR 1647.

<sup>35</sup> 5 CR 1494 (filed March 20, 2008). The motion also sought sanctions under the court’s inherent authority (*see id.* at 1495, 1497-98), but the trial court did not grant a sanction request made in that section of the motion. *Compare id.* at 1511-16 with 5 CR 1714 (modified final judgment).

<sup>36</sup> 5 CR 1723, ¶ 17.

<sup>37</sup> 5 CR 1719, ¶ 7 (emphasis added); *see also* 5 CR 1727, ¶ 14 (again finding April 13, 2007, as date after which assertions were groundless).

pleadings were signed before April 13, 2007.<sup>38</sup> The next pleading filed on Leslie's behalf—the second amended will contest—was filed on September 7, 2007, after Joe withdrew from the case.<sup>39</sup> It was signed by Ferrero, who was not subject to the \$40,000 sanction.<sup>40</sup>

Rule 13 plainly states that an attorney can be sanctioned only if the attorney signed a groundless pleading.<sup>41</sup> As this Court stated in *GTE Communications v. Tanner*, “[b]y its express language, Rule 13 applies only to pleadings ... signed by attorneys.”<sup>42</sup> In *GTE*, this Court held that it was a clear abuse of discretion to sanction an attorney for filing documents signed by others.<sup>43</sup> Joe Pool cannot be sanctioned for the allegations made in the original and first amended will contests when the trial court specifically elected to find that these pleadings were not groundless, and that the claims became groundless after the pleadings were filed. Joe cannot be sanctioned for the allegations made in the second amended will contest because he did not sign it. The \$40,000 sanction against Joe Pool fails as a matter of law.

The \$40,000 sanction against Leslie and Joe is based on Leslie maintaining her lack of capacity and undue influence claims after April 13, 2007 and “until September 14, 2007.”<sup>44</sup> The undue influence claim, however, was dropped from the second amended petition<sup>45</sup> which means that Leslie did not restate her undue influence claim in a pleading

---

<sup>38</sup> See 1 CR 19 (filed December 11, 2006); 1 CR 28 (filed March 6, 2007).

<sup>39</sup> 2 CR 423 (motion to withdraw); 3 RR (4/14/08) 67-68 (withdrawal order signed August 13, 2007).

<sup>40</sup> See 4 CR 894, 908 (second amended petition); 5 CR 1723, ¶17 (Ferraro not sanctioned).

<sup>41</sup> See TEX. R. CIV. P. 13.

<sup>42</sup> 856 S.W.2d 725, 730 (Tex. 1993).

<sup>43</sup> *Id.*

<sup>44</sup> See 5 CR 1727, ¶ 14 (finding that claims were groundless after April 13, 2007); 5 CR 1727, ¶ 15 (“Ms. Pool and her lawyers maintained her Capacity and Undue Influence Claims until September 14, 2007.”) (emphasis added).

<sup>45</sup> See 4 CR 894 (filed September 7, 2007).



filed after April 13, 2007—the date on which the claim became groundless according to the trial court. Texas law does not appear to allow a sanction to be imposed for the maintenance of a claim unless a new pleading is signed after the date the claim becomes groundless.<sup>46</sup> Petitioners can find no Texas law imposing an affirmative duty to non-suit a claim that has become groundless during the pendency of the case. At the very least, this is an open question and cannot support a sanction.

The \$40,000 penalty is tied to both the lack of capacity and undue influence claims.<sup>47</sup> The order does not state how the amount of the penalty was derived but, presumably, some part of the penalty is related to each claim. The fact that the order does not state how the court arrived at the amount of the penalty is error requiring reversal,<sup>48</sup> which is compounded by having two claims lumped into a single sanction.

Furthermore, the trial court erred in finding the testamentary capacity claim to be substantively groundless.<sup>49</sup> The trial court’s sanctions order minimizes the facts known by Leslie that supported her claim that her father lacked testamentary capacity or might have been unduly influenced when he signed the will. Leslie’s claim is not based on the fact that “had given his wife everything except a watch.”<sup>50</sup> Her claim was not based on the fact that “the Will’s definition of ‘Children’ included his step-children in addition to

---

<sup>46</sup> Danae relied on *Monroe v. Grider*, 884 S.W.2d 811 (Tex. App.—Dallas 1994, writ denied) as authority for imposing a sanction for maintaining a claim. *Monroe* states: “We hold that, for Rule 13 purposes, a party acts in bad faith when discovery puts him on notice that his understanding of the facts may be incorrect and he does not make a reasonable inquiry into the facts before filing a pleading ....” *Id.* at 819.

<sup>47</sup> See 5 CR 1719-23, ¶¶ 6-17.

<sup>48</sup> See *Low v. Henry*, 221 S.W.3d 609, 619-22 (Tex. 2007) (court must state basis for the amount of a severe sanction).

<sup>49</sup> Petitioners are not briefing whether there was a fact issue on Leslie’s lack of testamentary capacity claim that should have precluded summary judgment. That issue is an unbriefed issue, to be discussed in a brief on the merits.

<sup>50</sup> 5 CR 1719-20, ¶ 7.

his natural children,” or “that the Will had a defective residuary clause.”<sup>51</sup> Her claim was based on the fact Donn’s will disposed of Donn’s property in a way that was contrary to what Donn had told Leslie for years, and on the fact that the face of the will did not appear to be a will made by a person having capacity at the time. If the fact that the testator made an unnatural disposition of his property can be evidence of the lack of testamentary capacity or undue influence,<sup>52</sup> why can’t a disposition that is contrary to 25 years of conversations also be evidence of a lack of testamentary capacity? If a will is nonsense on its face, such that any reasonable person would think it was written by a person lacking capacity, wouldn’t the will itself be considered evidence of the lack of testamentary capacity? Leslie is not asserting that Donn’s purported will of June 16, 1994, is nonsense. But she is asserting that the will itself, and the unexpected disposition made in the will, are some evidence of the lack of testamentary capacity. These claims are not groundless.

Furthermore, Leslie knew that her father was intoxicated almost every day, from before 1981, when Helen was killed, through the date of his death.<sup>53</sup> She did not have to be with her father on June 16, 1994, to know that his drinking problem probably had not resolved on the day he signed the purported will. The face of the will and the disposition made therein seemed to her like the kind of thing her father might do if he was intoxicated. Leslie’s theory was that her father could have been intoxicated, or under the

---

<sup>51</sup> 5 CR 1720, ¶ 8.

<sup>52</sup> See e.g. *Gayle v. Dixon*, 583 S.W.2d 648, 651 (Tex. Civ. App.—Houston [1<sup>st</sup> Dist.] 1979, writ ref’d n.r.e.) (undue influence); *Dominguez v. Duran*, 540 S.W.2d 567, 571 (Tex. Civ. App.—Houston [1<sup>st</sup> Dist.] 1976, writ ref’d n.r.e.) (testamentary capacity).

<sup>53</sup> See 2 RR (4/11/08) 171 (Donn was intoxicated when Helen was killed); *id.* 180-83 (Donn was an alcoholic who drank every day); 3 RR (4/14/08) 24-25 (Donn was a drinker); *id.* 82-84 (discussing Donn drinking); *id.* 112 (same).

influence of medications, when he signed his will, and that the intoxication or medication could have deprived him of testamentary capacity.<sup>54</sup> Leslie's claim that her father's alcoholism might have affected his testamentary capacity and led to him being unduly influenced is not groundless.

Undoubtedly, her testamentary capacity and undue influence claims would be difficult to prove. Leslie did not have first-hand knowledge of his capacity or the influences on him at the moment he put pen to paper. Her case would be built on circumstantial evidence. But building a will-contest case on circumstantial evidence is not sanctionable conduct.<sup>55</sup> It does not become sanctionable just because the other side has to expend money to defend the action.<sup>56</sup>

There also is an issue about the burden of proof. Because Leslie contested the will before it was admitted to probate, she did not have the burden to prove the lack of testamentary capacity.<sup>57</sup> Instead, Danae, as proponent of the will, had the burden to prove that Donn had capacity on the day he executed the will. The fact that the will was self-

---

<sup>54</sup> See 3 RR (4/14/08) 24-30; see also *Bettis v. Bettis*, 518 S.W.2d 396, 399 (Tex. Civ. App.—Austin 1975, writ ref'd n.r.e.) (“We are of the view that alcoholism like other illnesses or senility may effect one’s testamentary capacity. And in order to determine testamentary capacity, or lack thereof, the finder of fact should be given all of the relevant and competent testimony regarding the mental condition of the testator, including the fact of alcoholism and its effects upon him.”); *Brewer v. Foreman*, 362 S.W.2d 350, 356-57 (Tex. Civ. App.—Houston 1962, no writ) (“Appellants complain of the actions of the trial court in admitting evidence that testatrix used alcohol. While this testimony might have had a prejudicial effect on appellants’ case, it was admissible both on the issue of testamentary capacity and that of undue influence.”).

<sup>55</sup> See *In re Estate of Graham*, 69 S.W.3d 598, 606 (Tex. App.—Corpus Christi 2001, no pet.) (setting out elements for challenging a testator’s mental capacity with circumstantial evidence); *Horton v. Horton*, 965 S.W.2d 78, 85 (Tex. App.—Fort Worth 1998, no pet.) (same); see also *Croucher v. Croucher*, 650 S.W.2d 55, 57 (Tex. 1983) (discussing circumstantial evidence used in that case to show lack of capacity on the day the will was signed).

<sup>56</sup> See *Hawkins v. Estate of Volkmann*, 898 S.W.2d 334, 336 (Tex. App.—San Antonio 1994, writ denied) (reviewing Rule 13 sanctions in the context of a will contest and noting that, “a party has the right to contest a will and be heard on the merits. Litigation, conducted in good faith (as well as in bad faith), is expensive. Just because one party is causing another party to expend money in defending itself is not objectionable.”).

<sup>57</sup> See *Croucher*, 650 S.W.2d at 57.

proved did not shift the burden from Danae to Leslie.<sup>58</sup> The trial court, however, proceeded under the theory that Leslie had the burden to prove that Donn lacked testamentary capacity and sanctioned her when, in its opinion, she failed to do so.<sup>59</sup>

Additionally, the trial court and Danae made it more difficult for Leslie to carry the burden she did not have. Leslie sought to obtain medical records from Danae.<sup>60</sup> Danae responded by seeking sanctions for Leslie's having filed a motion to compel production of the records.<sup>61</sup> At the hearing on Leslie's motion to compel, Danae's lawyer argued Leslie's discovery efforts were procedurally defective,<sup>62</sup> but Danae's lawyer also said that the medical records could be obtained by a request for production to his clients, which already had been served.<sup>63</sup> And Danae's lawyer never denied that either Danae or Marianne had the medical records.<sup>64</sup> In other words, Danae's argument was form over substance. The trial court, however, agreed with Danae, denied Leslie's motion to compel, and imposed a \$2,500 sanction on Leslie and Joe.<sup>65</sup>

In response to Leslie's request for production, Danae produced some records for 1983-85 and 1993-95, which is all Danae's lawyers regarded as relevant to Leslie's claims.<sup>66</sup> Danae objected to being required to produce any other medical records, and the

---

<sup>58</sup> *Id.*

<sup>59</sup> See 5 CR 1719, ¶ 7 ("Ms. Pool had no factual basis to support her claims"); *id.* at 1720-21, ¶ 9 (discussing alleged failures in Leslie Pool's evidence).

<sup>60</sup> 1 CR 106, 107, ¶¶ 7-10. Leslie was entitled to the records. The Probate Code provides that "a person who is a party to a will contest or a proceeding in which a party relies on the mental or testamentary capacity of a decedent before the decedent's death as part of the party's claim or defense is entitled to production of all communications or records relevant to the decedent's condition before the decedent's death ... [from a] physician, hospital, medical facility, custodian of records, or other person in possession of the communications or records ...." TEX. PROB. CODE § 10B.

<sup>61</sup> 2 CR 288, 295.

<sup>62</sup> 4/2/07 RR 69-70, 85-86; *see also* 2 CR 288.

<sup>63</sup> *Id.* at 85; *see also id.* at 70; *see also* 2 CR 293 (noting that Leslie's request for production was pending response).

<sup>64</sup> 3 RR (4/14/07) 125 (Joe testifies that Danae and Mariann never denied that they had the medical records).

<sup>65</sup> *Id.* at 90-91; 2 CR 341, 342.

<sup>66</sup> 12/4/07 RR 17-22; 3 CR 673, 707 (response 98); *id.* at 727, 747 (responses 19 and 98).

trial court did not compel Danae to produce other medical records.<sup>67</sup>

To add insult to injury, one basis for Danae’s request for sanctions against Leslie and her attorneys was that they never procured medical records from other sources to support the capacity and undue influence claims.<sup>68</sup> And the trial court based sanctions on the fact that “Leslie Pool and her lawyer Joe Pool did not have any medical records ... to support the pleadings that alleged the Capacity and Undue Influence Claims.”<sup>69</sup>

Ultimately, the trial court found that the “claims were maintained in bad faith” and that “[t]he bad faith maintenance of the groundless [claims] caused a needless increase in the cost of litigation fees and expenses ....”<sup>70</sup> Rule 13 provides that the particulars of the court’s finding of good cause “must be stated in the sanction order.” The use of the word “must” indicates that the requirement for particularity in a sanctions order is mandatory.<sup>71</sup> The conclusory finding that the claims were maintained in bad faith is not sufficient to satisfy Rule 13’s particularity requirement.<sup>72</sup> The lack of particularity doubtless stems from the fact that there was no actual evidence of bad faith.

---

<sup>67</sup> 12/4/07 RR 12-22.

<sup>68</sup> 5 CR 1494, 1500; *see also* 2 RR (4/11/08) 162, 173, 201-07; 3 RR (4/14/08) 30, 49, 124-26, 142-43, 202-03; 4 RR (4/15/08) 42 (all instances of Danae’s attorney using the lack of medical records as grounds for sanctions); *Cire v. Cummings*, 134 S.W.3d 835, 837, 839-46 (Tex. 2004) (upholding sanction against a party who refused to produce records in discovery when those records were the only object evidence supporting the other party’s claim).

<sup>69</sup> 5 CR 1721, ¶ 10.

<sup>70</sup> 5 CR 1722, ¶ 14.

<sup>71</sup> *See Albertson’s Inc. v. Sinclair*, 984 S.W.2d 958, 961 (Tex. 1999) (the statutory use of “shall” is construed as mandatory, unless otherwise indicated by legislative intent); *see also Luxenberg v. Marshall*, 835 S.W.2d 136, 141 (Tex. App.—Dallas 1992, no writ) (trial court’s failure to state the particulars of good cause in its order constitutes noncompliance with the rule); *Watkins v. Pearson*, 795 S.W.2d 257, 260 (Tex. App.—Houston [14th Dist.] 1990, writ denied) (sanction order is unenforceable if it fails to state particularities).

<sup>72</sup> *Mattly v. Spiegel, Inc.*, 19 S.W.3d 890, 895-96 (Tex. App.—Houston [14th Dist.] 2000, no pet.) (“judgment [that] recites only the ultimate conclusions the court is required to make in assessing sanctions, and does not state any facts to support it is an abuse of discretion”); *Tarrant County v. Chancey*, 942 S.W.2d 151, 155 (Tex. App.—Fort Worth 1997, no writ) (trial court that simply states that it finds the motion was filed “for the purposes of harassment, causing unnecessary delay, needles [sic] increase in the cost of litigating of Plaintiffs [sic] case, and for the purpose of denying Plaintiff access to relevant documents” are general findings that are insufficient to satisfy the particularity requirements of Rule 13).

## 2. \$30,000 Sanction for the Acreage Claim

The trial court imposed a \$30,000 sanction on Joe Pool for filing and maintaining the “Acreage Claim.”<sup>73</sup> In her first amended petition, Leslie sought the imposition of a constructive trust on about 15 acres of land held by her father.<sup>74</sup> Leslie’s claim was that her mother, Helen, intended to use money she was to be paid for acting as the executor of the estate of Gyda Hallum to purchase about 15 acres of land from that estate; and that Helen and Donn had agreed that they would eventually give the 15 acres to their daughters, Danae and Leslie.<sup>75</sup> Sadly, Helen died before the Hallum estate was closed. The income she was to earn was paid to her estate and received by Donn. According to Leslie, Donn used that money to purchase the 15 acres, although he did so indirectly through Donald Beck, who held the property for a year before re-conveying it to Donn.<sup>76</sup> Leslie sought imposition of a constructive trust on this property under the theory that Donn was merely holding it for the benefit of Danae and Leslie.<sup>77</sup>

The trial court’s sanctions order, however, twists the facts to paint a picture of frivolity in pleading, stating, for example: “Somehow knowing that Helen Durio would soon die, Mr. Durio allegedly agreed that he would hold the property until his death, whereupon he would devise it through his will to Leslie Pool and Danae Diana.”<sup>78</sup> That was never Leslie’s claim. And the trial court lays-out a series of facts that further misconstrue Leslie’s arguments. The sanctions order states, for example: “Neither Donn

---

<sup>73</sup> 5 CR 1725, ¶ 27.

<sup>74</sup> 1 CR 28, 30-33.

<sup>75</sup> *Id.*; see also 3 RR (4/14/08) 211-13.

<sup>76</sup> See 3 RR (4/14/08) 113-14 122-23.

<sup>77</sup> See 3 RR 214-15; 4 RR (4/15/08) 69.

<sup>78</sup> 5 CR 1723, ¶ 19.

nor Helen Durio owned the acreage while Helen was alive.”<sup>79</sup> Leslie never said they did. The order then states: “While Helen Durio’s estate may have received some money from the estate of Gyda Hallum ... Helen Durio never received any money from the estate of Gyda Hallum while she was alive.”<sup>80</sup> Leslie never said she did. The order continues: “Leslie Pool and her lawyer Joe Pool failed to reasonably investigate the Acreage Claim to obtain publically available documents, such as deed records, that revealed these facts.”<sup>81</sup> This finding is directly contrary to the record. Joe Pool attached 50 pages of public records related to the Hallum estate to the first amended petition.<sup>82</sup>

The sanctions order mischaracterizes Leslie allegations and implies that Joe did not know the facts. It would be laughable except that these statements build a case for imposing a \$30,000 sanction on Joe Pool. The court ultimately sanctions Joe because “[t]he Acreage Claim also lacked evidentiary support, and there had been a reasonable opportunity for investigation and discovery.”<sup>83</sup> This was a clear abuse of discretion because the trial court based its order on a clearly erroneous assessment of the facts.<sup>84</sup>

The trial court also found that the acreage claim was not warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law because the claim failed as a matter of law under Probate Code § 59A, the statute of frauds, and for want of consideration.<sup>85</sup> Texas law, however, recognizes that a constructive or resulting trust may be imposed on estate property and may avoid the

---

<sup>79</sup> 5 CR 1724, ¶ 21.

<sup>80</sup> 5 CR 1724, ¶ 21.

<sup>81</sup> 5 CR 1724, ¶ 21.

<sup>82</sup> 1 CR 41-91.

<sup>83</sup> 5 CR 1725, ¶ 25.

<sup>84</sup> *Monroe v. Grider*, 884 S.W.2d 811, 816 (Tex. App.—Dallas 1994, writ denied).

<sup>85</sup> 5 CR 1724, ¶ 22; 5 CR 1725, ¶ 25.

statute of frauds (Probate Code § 59A is a form of the statute of frauds).

In *Pope v. Garrett*, for example, Simons prepared a will devising her property to Garrett.<sup>86</sup> When Simons attempted to execute the will, two of her heirs forcibly prevented her from signing it.<sup>87</sup> Simons died without executing the will, and her property passed to her heirs. This Court held that a constructive trust was imposed on the property to prevent the heirs who stopped Simons from signing the will from inheriting the property.<sup>88</sup> “It is generally held,” this Court stated, “that the constructive trust is not within [the statute of frauds or statute of wills] or is an exception to them. It is the creature of equity.”<sup>89</sup> At the very least, Leslie’s constructive and resulting trust claims have support in existing law or in the extension or modification of existing law. The trial court’s conclusion that Leslie’s constructive and resulting trust claims were precluded by the statute of frauds and Probate Code § 59A—and groundless—is an error of law and an abuse of discretion.<sup>90</sup>

Furthermore, as with the \$40,000 sanction, the trial court provides no analysis as to how it derived the amount of the sanction, which, by itself, is an abuse of discretion.<sup>91</sup>

### **3. \$20,000 Sanction for the Forgery and Lack of Formalities Claims**

The trial court’s sanctions order imposes, under Rule 13, a \$20,000 sanction on Leslie and Joe related to Leslie’s claims that the 1994 will was a forgery and was

---

<sup>86</sup> 211 S.W.2d 559, 559 (Tex. 1948).

<sup>87</sup> *Id.* at 560.

<sup>88</sup> *Id.* at 561.

<sup>89</sup> *Id.*; see also *Rankin v. Naftalis*, 557 S.W.2d 940, 944 (Tex. 1977) (constructive trust escapes the parole evidence rule and statute of frauds); *Pickelner v. Adler*, 229 S.W.3d 516, 527 (Tex. App.—Houston [1<sup>st</sup> Dist.] 2007, pet. denied) (citing *Pope* and *Rankin*; constructive trust avoids the statute of frauds and statute of wills).

<sup>90</sup> *Monroe*, 884 S.W.2d at 816 (a trial court abuses its discretion in imposing sanctions if it bases its order on an erroneous view of the law).

<sup>91</sup> See note 48, *supra*.











# **App. A**









the entire contents of the file in this matter, including all pleadings, motions, responses, exhibits, and evidence in the file. In addition, the Court considered the March 19, 2008 Motion for Sanctions, the exhibits attached to the motion, the response, the evidence submitted during the hearing, and the arguments of counsel.

It is ORDERED and ADJUDGED that the order dated March 20, 2008 disposing of all claims of Ms. Pool is modified to include the following findings, conclusions, and awards of sanctions:

1. Joe Pool, as attorney for Leslie Pool, signed the Original Contest, the First Amended Contest, and the March 6, 2008 "Response to Danae Durio Diana's Motion for Final Summary Judgment that Donn Durio's Will is Not a Forgery and Complies with Will Formalities" ("the March 6 Response"). Joe Pool, as one of attorneys for Leslie Pool, drafted the Second Amended Contest and provided it to Peter Ferraro who signed and filed the Second Amended Contest as attorney of record for Leslie Pool.
2. Donn Durio signed a 1994 will that, according to Marianne Durio, was prepared by Donn using a computer software program. In that will, he defined his children by naming six persons, which included his two natural born children from his previous marriage to Helen Durio and four step-children from his marriage to Marianne Durio.
3. Ms. Pool is Mr. Durio's daughter and she knew Mr. Durio her whole life. Mr. Pool is Mr. Durio's son-in-law, and he knew Mr. Durio for approximately 26 years before Mr. Durio died on September 29, 2006. Mr. Pool had represented Mr. Durio in several legal matters. Those matters included preparing a draft will for Mr. Durio in 1982, and representing Mr. Durio in Mr. Durio's acquisition of the 15 acres that is a part of Mr. Durio's estate and that was a substantial focus of Ms. Pool's contest of the Will.

4. Ms. Pool gave her deposition testimony in this case on April 12, 2007. Mr. Ferraro made his appearance as counsel for Leslie Pool in this case on that day, and he was present for Ms. Pool's deposition. Mr. Pool gave his deposition testimony on April 13, 2007. Ms. Durio gave her deposition on April 17, 2007. Ms. Diana gave her deposition on April 18, 2007. Ms. Diana and Ms. Durio responded to discovery and before the April depositions produced documents in response to discovery requests. Ms. Diana and Ms. Durio supplemented their discovery responses and document production throughout the case.
5. Leslie Pool and her lawyer Joe Pool knew, and they and Mr. Ferraro were put on notice no later than April 13, 2007, that Mr. Durio had executed an earlier will in 1984 that devised all of his estate to Marianne Durio.
6. In Ms. Pool's original will contest, her first amended will contest, and her second amended will contest, she challenged the Will on the basis that Mr. Durio lacked testamentary capacity ("Capacity Claim"). In the original will contest and the first amended contest, Ms. Pool also challenged the Will on the basis that Mr. Durio was unduly influenced to execute the Will ("Undue Influence Claim").
7. While arguably Ms. Pool's original will contest and her first amended will contest that alleged the Capacity and Undue Influence Claims are groundless *ab initio*, the Court does not make such a finding. However, the court does find these two claims groundless from the point that the depositions of Leslie Pool and Joe Pool were concluded on April 13, 2007. After April 13, 2007, Ms. Pool had no factual basis to support her claims, and the claims were not warranted by a good faith argument for the extension, modification, or reversal of existing law. Ms. Pool conceded that she never questioned her father's capacity nor contended he was being unduly

influenced until she read the Will and saw that her father had not left her a bequest and that her father had given his wife everything except a watch.

8. Ms. Pool's argument that the Will itself supported the Capacity and Undue Influence Claims is groundless factually and legally. Ms. Pool's contentions were that the Will's definition of "Children" included his step-children in addition to his natural children, that the Will had a defective residuary clause, and that the Will's dispositive provisions disinherited her. Ms. Pool believed these alleged defects supported a finding that Mr. Durio lacked capacity or was unduly influenced. The Court finds these assertions and arguments that Ms. Pool offered as support that the Will showed that Mr. Durio lacked capacity or was unduly influenced are frivolous and groundless. Had Ms. Pool, or Mr. Pool as her attorney, conducted a reasonable legal inquiry into their Capacity and Undue Influence Claims, which they did not do, they would have learned: (1) that a testator can define his family in any manner that he wishes, (2) that the residuary clause even if defective, had no bearing on the dispositive provisions as there were beneficiaries entitled to receive dispositions prior to anyone that would have received under the alleged defective part of the residuary clause and (3) that Mr. Durio's disposition of the bulk of his property to his wife was not unnatural, but was normal.
9. Leslie Pool and her lawyer Joe Pool failed to conduct a reasonable inquiry to ensure that their pleadings alleging the Capacity and Undue Influence Claims were not groundless. They failed to reasonably inquire of persons who had knowledge of the execution of the Will, of Mr. Durio's testamentary capacity, and of whether Mr. Durio was unduly influenced when he executed the Will. To the extent they made any inquiry of any such persons, they obtained no evidence to provide any factual or legal support for these claims. Leslie Pool and her lawyer

Joe Pool received ample evidence that such persons with such knowledge demonstrated that the Capacity and Undue Influence Claims were groundless.

10. Leslie Pool and her lawyer Joe Pool did not have any medical records or other evidence to support the pleadings that alleged the Capacity and Undue Influence Claims. That is so despite Mr. Pool's testimony on April 13, 2007 that medical records would be necessary to support the Undue Influence Claim. In April 2007, Leslie Pool and her lawyer Joe Pool received medical records of Mr. Durio through discovery. None of those medical records provided a factual or legal basis to support the Capacity and Undue Influence Claims. Leslie Pool and her lawyer Joe Pool failed to conduct a reasonable inquiry at any time to ensure that the Capacity and Undue Influence Claims were not groundless by failing to seek or obtain (from any other sources) any medical records to support these Claims.
11. Leslie Pool and her lawyer Joe Pool alleged several factors in support of their contention that Mr. Durio lacked capacity to execute the Will. As set forth in the First Amended Contest, those allegations include, "... Decedent's long-lived heavy cigarette smoking, his chronic alcohol consumption, his deafness from long term constant exposure to high decibel sound from jet engines in the Air Force, his suffering from disabilities, his general deteriorating physical and mental health as a result of hard living as an Air Force Officer and his depression, ..." Also, Leslie Pool and her lawyer Joe Pool alleged several factors in support of their contention that Mr. Durio was unduly influenced. Those are set out in the First Amended Contest, and include an allegation that Ms. Durio lived with, and was in close contact with, Mr. Durio, to whom she was married. The Court finds these pleadings to be factually and legally frivolous and groundless, at least from April 13, 2007 onward. After their April depositions, Leslie Pool and her lawyer Joe Pool had no evidence to allege in her pleadings that Mr. Durio lacked capacity,

or that he was unduly influenced, when he executed the Will. For example, the Court finds that Mr. Durio quit smoking in 1985, and he was not diagnosed until 2005 with the cancer that caused his health to deteriorate and ultimately his death.

12. On April 13, 2007, Mr. Pool testified that Ms. Pool was probably going to dismiss the Undue Influence Claim and possibly the Capacity Claim. Mr. Pool also testified that it appeared to him that it could not be asserted that Mr. Durio lacked capacity or was unduly influenced.
13. On June 12, 2007, counsel for Ms. Diana and Ms. Durio wrote a letter to Mr. Peter Ferraro, a lawyer hired by Ms. Pool to act as co-counsel with her husband Mr. Pool, that put Ms. Pool and her attorney Mr. Pool on notice that her pleadings, including the Capacity and Undue Influence Claims, were groundless. To avoid unnecessary litigation expense, counsel for Ms. Diana and Ms. Durio requested that these groundless claims be dismissed, and informed Ms. Pool and her lawyers that sanctions would be sought if they were not dismissed. On June 26, 2007, counsel for Ms. Diana followed up with that letter asking for a response.
14. The Court finds that no later than April 13, 2007, the Pools knew, or were on notice through discovery, that their pleadings that asserted the Capacity and Undue Influence Claims were groundless and that they had no factual or legal basis. The Court finds that these claims were maintained in bad faith.
15. Ms. Pool and her lawyers maintained her Capacity and Undue Influence Claims until September 14, 2007. Ms. Diana moved for summary judgment on both claims. Ms. Pool failed to respond to the no evidence motion for summary judgment on the Undue Influence Claim. Ms. Pool nonsuited the Undue Influence Claim, and the Court granted summary judgment against the Capacity Claim.

16. The bad faith maintenance of the groundless Capacity and Undue Influence Claims caused a needless increase in the cost of litigation fees and expenses, and caused substantial damage to Ms. Diana and Ms. Durio.
17. Pursuant to Texas Rule of Civil Procedure 13, the Court orders Joe Pool and Leslie Pool, jointly and severally, to pay \$40,000 in sanctions to Danae Durio Diana and Marianne Durio. Leslie Pool and her lawyer Joe Pool shall deliver a cashier's check payable to McGinnis, Lochridge & Kilgore, L.L.P., for the benefit of Danae Diana and Marianne Durio, no later than 30 days from the date this Modified Judgment is signed.
18. In the First Amended Contest, Ms. Pool asserted a claim entitled "Equitable Relief Requested Imposition of a Constructive Trust on 14.58 Acres." In the Second Amended Contest, Ms. Pool asserted a claim entitled "Equitable Relief Requested Imposition of a Resulting Trust or a Constructive Trust on 14.58 Acres." Those claims in those pleadings will be referred to here as the "Acreage Claim."
19. The alleged basis of the Acreage Claim is set forth in Ms. Pool's First Amended Will Contest. Ms. Pool claims that Mr. Durio and his first wife, Helen Durio, allegedly formulated a "Family Agreement" whereby they agreed to buy the 14.58 acres with funds that Helen Durio was to receive for her work on the estate of Gyda Hallum. Somehow knowing that Helen Durio would soon die, Mr. Durio allegedly agreed that he would hold the property until his death, whereupon he would devise it through his will to Leslie Pool and Danae Diana. Mr. and Ms. Pool testified at their depositions that the above allegations formed the basis of their Acreage Claim.
20. The Acreage Claim lacked any evidentiary support and there had been a reasonable opportunity for investigation and discovery.

21. Leslie Pool and her lawyer Joe Pool had actual knowledge, or received knowledge through discovery no later than April 13, 2007 of the following facts: (1) Neither Donn nor Helen Durio owned the acreage while Helen was alive. Rather, Donn Durio purchased the property approximately 18 months after Helen Durio died. (2) While Helen Durio's estate may have received some money from the estate of Gyda Hallum for her service as executor, Helen Durio never received any money from the estate of Gyda Hallum while she was alive. Ms. Pool conceded at her deposition that her mother did not receive a fee from the estate before she died and thus could not have used such fee to buy anything. Leslie Pool and her lawyer Joe Pool failed to reasonably investigate the Acreage Claim to obtain publicly available documents, such as deed records, that revealed these facts.
22. The Acreage Claim is not warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. Had Mr. Pool done a reasonable investigation of the law, which he did not do, he would have known that the Acreage claim would be barred as a matter of law pursuant to any one of the following: Texas Probate Code §59A, the statute of frauds, and lack of consideration.
23. On June 12, 2007, Ms. Pool was put on notice in a letter that her Acreage Claim was groundless and would clearly fail as a matter of law for among other reasons, Texas Probate Code §59A, statute of frauds, and consideration. That letter also put Ms. Pool on notice that her Acreage Claim subjected her to sanctions, and the letter requested that the Acreage Claim be dropped. That letter was followed up with another letter on June 26, 2007 seeking a response to the June 12, 2007 letter.

24. The Court finds that Mr. Pool attempted to confuse the issues, and he unnecessarily increased the cost of litigation, by trying to plead Ms. Pool's Acreage Claim in a way to attempt to avoid the clear legal prohibitions to the Acreage Claim.
25. Mr. Pool's signing, filing, and maintaining the Acreage Claim in the First Amended Contest violates Texas Civil Practice and Remedies Code Section 10.001(2) because it was not warranted by existing law or by a nonfrivolous argument for the extension, modification, or reversal of existing law or the establishment of new law. The Acreage Claim also lacked evidentiary support, and there had been a reasonable opportunity for investigation and discovery.
26. Mr. Pool's violation of Section 10.001(2) caused substantial damage to Ms. Diana and Ms. Durio.
27. Pursuant to Section 10.004, the Court orders Joe Pool to pay \$30,000 in sanctions to Danae Durio Diana and Marianne Durio. Mr. Pool shall deliver a cashier's check payable to McGinnis, Lochridge & Kilgore, L.L.P., for the benefit of Danae Diana and Marianne Durio, no later than 30 days from the day this Modified Judgment is signed.
28. In Ms. Pool's Second Amended Contest, she asserted a claim entitled "Proponent's Defamation and Disparagement of Contestant." This claim will be referred to here as the "Defamation Claim."
29. Ms. Pool's Defamation Claim is groundless because it had no basis in law and was not warranted by a good faith argument for the extension, modification, or reversal of existing law.
30. A reasonable inquiry into the law or legal basis of the Defamation Claim, which was not done, would have revealed that the Defamation Claim was barred as a matter of law because the alleged conduct was privileged and could not form the basis of liability.



31. The Defamation Claim was factually groundless. On April 13, 2007, Mr. Pool testified that Ms. Pool had instructed him to drop the Defamation Claim from the suit and he represented that Ms. Pool was no longer complaining about the basis of the Defamation Claim.
32. Counsel for Ms. Diana and Ms. Durio sent six letters from June 12, 2007 to January 21, 2008 to Mr. Ferraro requesting that Ms. Pool follow through and dismiss the Defamation Claim to attempt to avoid the unnecessary increase in litigation costs. Through these letters, Ms. Pool and her lawyers were on notice that sanctions would be sought if the claim was not dismissed. Counsel for Ms. Diana and Ms. Durio provided the deposition transcript page and line numbers that reflected that the Defamation Claim would be dropped, and he provided to Ms. Pools' lawyers the forms to effect a nonsuit. Mr. Ferraro claims he was unaware that the Defamation Claim was included in the Second Amended Will Contest signed by Mr. Ferraro as the attorney in charge. Mr. Ferraro testified that although the defamation claim was factually discussed in an earlier pleading, it was an oversight that it was presented as a claim in the second amended pleading that he signed. While the Court believes it was an oversight, the Court finds that Mr. Ferraro should have paid closer attention to the letters from opposing counsel complaining of the continuation (or origination) of the Defamation Claim and should have had his client, Ms. Pool, immediately dismiss the Defamation Claim.
33. Ms. Pool did not nonsuit the Defamation Claim until Ms. Diana and Ms. Durio filed a motion for summary judgment to formally dispose of the Defamation Claim. Ms. Pool waited until two days before the hearing to dismiss the Defamation Claim.
34. Mr. Ferraro's signature on the Second Amended Contest violated Texas Rule of Civil Procedure 13 because Ms. Pool's Defamation Claim was groundless and brought and maintained in bad faith and for harassment. As noted above, Mr. Ferraro testified it was an oversight. However,

as also noted above, the Court finds that Mr. Ferraro should have paid closer attention to the letters from opposing counsel complaining of the continuation (or origination) of the Defamation Claim and should have had his client, Ms. Pool, immediately dismiss the Defamation Claim.

35. This violation caused substantial damage to Ms. Diana and Ms. Durio. Ms. Diana and Ms. Durio incurred substantial attorneys' fees and expenses to file, and prepare for the hearing on, the motion for summary judgment to dispose of the Defamation Claim even though Ms. Pool agreed to dismiss the claim months earlier, and Mr. Ferraro testified at the sanctions hearing that he never had any intention of pursuing the claim, but felt that he had to get Ms. Pool to dismiss it since he believed Joe Pool, who prepared many of the pleadings signed by Mr. Ferraro, was responsible for putting that claim in the Second Amended Contest.
36. Pursuant to Texas Rule of Civil Procedure 13, the Court orders Peter Ferraro to pay \$1,000 in sanctions to Danae Durio Diana and Marianne Durio. Mr. Ferraro shall deliver a cashier's check payable to McGinnis, Lochridge & Kilgore, L.L.P., for the benefit of Danae Diana and Marianne Durio, no later than 30 days from the day this Modified Judgment is signed.
37. Pursuant to Texas Rule of Civil Procedure 13, the Court orders Leslie Pool to pay \$6,000 in sanctions to Danae Durio Diana and Marianne Durio. Ms. Pool shall deliver a cashier's check payable to McGinnis, Lochridge & Kilgore, L.L.P., for the benefit of Danae Diana and Marianne Durio, no later than 30 days from the day this Modified Judgment is signed.
38. In each of her Contests, Ms. Pool alleged that Mr. Durio's will was forged and was not executed with the formalities required under Texas law. These claims will be referred to as the "Forgery Claim" and the "Formalities Claim."

39. The pleadings that alleged the Forgery and Formalities Claims were groundless and maintained in bad faith, no later than from April 13, 2007.

40. Leslie Pool and her lawyer Joe Pool failed to conduct a reasonable inquiry, which would have revealed what formalities were required and that the Will complied with all of them; and thus, the assertion that the Will failed to comply with formalities would fail as a matter of law. Ms. Pool's Formalities Claim had no basis in law or fact and was not warranted by a good faith argument for the extension, modification, or reversal of existing law.

41. Leslie Pool and her lawyer Joe Pool had no factual basis to assert that the Will was forged, whether by removal of pages, alteration, or any other theory asserted by Leslie Pool and her lawyer Joe Pool. The Forgery Claim was not warranted by a good faith argument for the extension, modification, or reversal of existing law. Leslie Pool and her lawyer Joe Pool knew that they had no evidence of these assertions, and they received discovery in April 2007 that demonstrated that the assertions were groundless. For example:

- Leslie Pool and her lawyer Joe Pool received Mr. Durio's 1984 Will in which Marianne Durio would have received Mr. Durio's estate, showing there was no motive for Marianne Durio to alter Ms. Durio's 1994 Will.
- Ms. Pool also received copies of Mr. Durio's 1994 Will and Ms. Durio's 1994 Will that were sent to Ms. Diana two days after the Wills were executed. The copy of Mr. Durio's Will that Ms. Diana received was the same as the original Will filed in this case. The copy of Ms. Durio's Will shows that it is a mirror image of Mr. Durio's will: all property to her husband if he survived, with a remainder to her natural born children and her stepchildren.

- On January 16, 2008, Mr. Ferraro sent Leslie and Joe Pool the software that was used to prepare the Will. In testing the software and how it produces wills, the lawyers and Ms. Pool should have immediately realized that any argument based on the lack of a page number on the first page of the Will was groundless.

All of this evidence showed Leslie Pool and her lawyer Joe Pool that the Forgery and Formalities Claims were groundless and had no factual basis.

42. Counsel for Ms. Diana and Ms. Durio sent letters on June 12, 2007, September 17, 2007, and January 17 and 18, 2008 that put Ms. Pool on notice that the pleadings asserting the Forgery and Formalities Claims were groundless, and that sanctions would be sought if they were not dismissed. Through these letters, counsel for Ms. Diana and Ms. Durio attempted to avoid the needless increase in the cost of litigation.

43. Ms. Pool maintained her Forgery and Formalities Claims until the Court disposed of them by summary judgment on March 6, 2008. On January 25, 2008, Ms. Diana filed her motion for summary judgment on the Forgery and Formalities Claims.

44. The Court finds that the various arguments asserted by Leslie Pool and her lawyer Joe Pool to support a finding of forgery—including the surmise and suspicion that Ms. Durio substituted pages of the Will, the lack of page numbering on page one, the lack of initials on the pages, and that sections in the Will did not flow—were frivolous and groundless and maintained in bad faith.

45. Mr. Pool's signing and filing of the Original Contest and the First Amended Contest violated Texas Rule of Civil Procedure 13 because the Forgery and Formalities Claims were groundless and were filed and maintained in bad faith and for harassment.

46. The pleadings and conduct needlessly increased the cost of litigation and caused substantial damage to Ms. Diana and Ms. Durio.
47. Pursuant to Texas Rule of Civil Procedure 13, the Court orders Joe Pool and Leslie Pool, jointly and severally, to pay \$20,000 in sanctions to Danae Durio Diana and Marianne Durio. Leslie Pool and her lawyer Joe Pool shall deliver a cashier's check payable to McGinnis, Lochridge & Kilgore, L.L.P., for the benefit of Danae Diana and Marianne Durio, no later than 30 days from the day this Modified Judgment is signed.
48. At the April 11, 2008 hearing on the Motion for Sanctions, Mr. Chilleri and Mr. Evans, the witnesses to the Will, each testified that on August 9, 2007, he told Mr. Pool that he had no memory or personal knowledge to testify about how many pages were in the Will, and that he could not testify that pages were missing or that page numbering had changed. Nonetheless, Mr. Pool still obtained affidavits from Mr. Chilleri and Mr. Evans on August 9, 2007 that represented that each had personal knowledge that, among other things, pages were missing from the Will.
49. On December 17, 2007, Mr. Chilleri and Mr. Evans each clearly and unequivocally testified at his deposition that he did not have personal knowledge regarding how many pages were in Mr. Durio's will, and whether any pages from Mr. Durio's will had been removed, destroyed, altered, forged, or were missing. Each witness testified that he could not provide testimony to the Court that pages from the Will were missing, and that it would be inaccurate to represent to the Court that his affidavit could be used to show that pages were missing. Each witness testified that he had no personal knowledge of, and that his testimony could not be used to support, Ms. Pool's assertion that the page numbering in the Will had changed. Each witness disclaimed his August 9, 2007 affidavit as inaccurate because he was confused by Mr. Pool, and

that he could not and would not sign the affidavit. On April 11, 2008, each witness affirmed that he so testified on December 17, 2007.

50. Ms. Pool attached the August 9, 2007 Chilleri and Evans affidavits to her March 6 Response, and she incorporated by reference those affidavits into her March 6 Response. The March 6 Response stated, "C. Richard Chilleri and Michael Evans testify in their affidavits that the Purported Will that has been filed by Proponent is Missing Pages. . . . The affidavits of C. Richard Chilleri and Michael Evans further state that the page numbering has changed on the pages filed as the Purported Will of Decedent." The March 6 Response represented to the Court that those witnesses had personal knowledge of, and were support for, Ms. Pool's Forgery Claim.

51. The Court finds that Mr. and Ms. Pool knew when the March 6 Response was filed that the Chilleri and Evans affidavits were inaccurate in many respects, had been effectively recanted in their December 2007 depositions, and thus could not be used as evidence or support for anything, including whether pages of the Will were missing or that page numbering had changed. Nonetheless, Leslie Pool and her lawyer Joe Pool knowingly attached and incorporated by reference the false and disavowed affidavits and used the affidavits in the March 6 Response as their support that pages were missing from the Will and that the page numbering in the Will had changed.

52. The Court finds Mr. Pool violated Chapter 10 and Rule 13 by signing and filing the March 6 Response. The March 6 Response, to which the Chilleri and Evans affidavits were attached, incorporated, and relied upon, was groundless and was filed in bad faith and for harassment. The March 6 Response was not warranted by a good faith extension, modification, or reversal of existing law. The Court finds that the March 6 Response had no evidentiary support and that

there was ample opportunity for investigation and discovery of evidentiary support. Leslie Pool and her lawyer Joe Pool had no factual basis to argue that pages were missing or that page numbering had changed, despite its attempt to rely upon the false affidavits. The March 6 Response was presented for an improper purpose, it attempted to unnecessarily confuse the issues, and it caused the needless increase in the cost of litigation.

53. Pursuant to Chapter 10 and Rule 13, the Court orders Joe Pool and Leslie Pool, jointly and severally, to pay \$5,000 in sanctions to Danae Durio Diana and Marianne Durio. Leslie Pool and her lawyer Joe Pool shall deliver a cashier's check payable to McGinnis, Lochridge & Kilgore, L.L.P., for the benefit of Danae Diana and Marianne Durio, no later than 30 days from the date this Modified Judgment is signed.

54. The Court finds that, as described above, Ms. Pool and her lawyers filed and maintained the pleadings and claims for which sanctions are being awarded for improper purposes. The Court finds that Ms. Pool and her lawyers filed and maintained the sanctionable pleadings—when she knew or when she was on notice no later than April 13, 2007—based upon her misconception that she was legally or factually entitled to receive a bequest from her father, and because she believed that it was unfair that her father devised substantially all of his estate to his wife of almost 23 years and not to her. The Court finds that the Will is Mr. Durio's Will that he executed on June 16, 1994.

55. The Court finds that Ms. Pool and her lawyer Joe Pool filed and maintained these sanctioned pleadings to confuse the issues and to needlessly increase the cost of litigation, and that they did needlessly and substantially increase the cost of this litigation.

56. The Court finds the amounts in sanctions to be reasonable to punish Ms. Pool and her lawyers for their sanctionable conduct, to deter further abuses, and to compensate Ms. Diana and

Ms. Durio for the substantial damage they have incurred as a result of that conduct. The Court considered lesser sanctions, but believes these sanctions are just and appropriate.

57. The Court finds that Ms. Diana and Ms. Durio's March 19, 2008 motion for sanctions is not frivolous or groundless and was not brought in bad faith.

All orders of this Court identified in this Judgment are affirmed as modified and are incorporated into this Modified Final Judgment Admitting Will to Probate and Authorizing Letters Testamentary.

All relief requested but not expressly granted in this order is hereby denied.

This Modified Final Judgment disposes of all parties and claims, and it is a final and appealable judgment.

SIGNED April 21, 2008.

  
JUDGE PRESIDING



# **App. B**

**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

---

---

**NO. 03-08-00363-CV**

---

---

**Leslie Durio Pool, Appellant**

**v.**

**Danae Durio Diana, Appellee**

---

---

**FROM THE PROBATE COURT NO. 1 OF TRAVIS COUNTY  
NO. 85,839, HONORABLE GUY S. HERMAN, JUDGE PRESIDING**

---

---

**MEMORANDUM OPINION**

Appellant Leslie Durio Pool appeals the probate court's judgment that she take nothing on her will-contest claims and that she and her attorneys pay sanctions totaling \$109,500. We will affirm the probate court's judgment. Also, for reasons described herein, we are granting a motion for penalties against Ms. Pool and her counsel.

On June 16, 1994, Donn Durio executed a will leaving everything to his third wife of twenty-two years, Marianne, and nothing to his children, Leslie and Danae.<sup>1</sup> On November 21, 2006, after Donn's death in September 2006, Danae, Leslie's sister, applied to probate Donn's will. On December 11, 2006, Leslie filed a will contest, which she styled "Objections and Opposition to Probate of Will and Issuance of Letters Testamentary [and] Request for Order to Produce a Will."

---

<sup>1</sup> As several individuals with common surnames are involved in the events leading to this lawsuit, we will refer to them by their first names for clarity.

Leslie's will contest included allegations that Donn lacked testamentary capacity, that a 15-acre Hamilton Pool Road property conveyed in the will had been orally promised to her, that the will was the product of forgery or that its drafter failed to comply with formalities, and that the will was the product of undue influence. She also brought claims against Danae for defamation and disparagement. Leslie amended her will contest twice during the course of the litigation, on March 6, 2007, and on September 7, 2007.

On September 14, 2007, the probate court granted summary judgment in favor of Danae, rejecting Leslie's claims that Donn lacked testamentary capacity and that Leslie was entitled to an interest in the 15-acre Hamilton Pool Road property. Also on September 14, 2007, Leslie nonsuited her undue influence claim, and the probate court dismissed that claim with prejudice.

On March 4, 2008, Leslie nonsuited her claims against Danae alleging defamation and disparagement, and the probate court signed an order dismissing those claims on March 6, 2008. Also on March 6, 2008, the probate court granted summary judgment on Leslie's claims that the will was a forgery or that its drafter failed to comply with formalities. This order of summary judgment, signed on March 20, 2008, disposed of the last of Leslie's claims. On March 25, 2008, following an evidentiary hearing, the probate court admitted Donn's will to probate.

On March 19, 2008, Danae and Marianne filed a motion for sanctions against Leslie, Joe Pool, and Peter Ferraro. Joe Pool is Leslie's husband and was her attorney of record from December 11, 2006, the day Leslie brought her will contest, until the probate court signed Joe's motion to withdraw on August 13, 2007. Peter Ferraro is an attorney who made his appearance on April 12, 2007, and remains Leslie's attorney of record on appeal.

The probate court ultimately imposed sanctions totaling \$109,500.<sup>2</sup> Of the total award, \$101,000 in sanctions was awarded following a four-day evidentiary hearing during which one of the attorneys representing Marianne and Danae testified that his clients had incurred over \$350,000 in attorney's fees and costs in responding to Leslie's "pleadings, claims and actions that [were] alleged to be groundless and in bad faith or harassing or otherwise sanctionable." The attorney testified that he did not include attorney's fees or costs incurred in admitting the will to probate. Billing statements from the attorney's law firm to support the alleged amount of incurred attorney's fees of \$350,000 were also admitted. After the hearing, the probate court modified its final judgment admitting the will to probate to include the award of sanctions with detailed findings concerning the sanctions.

In her first four issues, Leslie argues that the probate court erred in granting Danae's three motions for summary judgment because Leslie had presented more than a scintilla of evidence to support these claims. Danae's three motions included both traditional and no-evidence grounds, and we may affirm on either ground. *See Provident Life & Accident Ins. Co. v. Knott*, 128 S.W.3d 211, 216 (Tex. 2003) (where order does not specify the grounds for summary judgment, appellate court must affirm the summary judgment if any of the theories presented to the district court are meritorious).

We review the district court's summary judgment de novo. *Valence Operating Co. v. Dorsett*, 164 S.W.3d 656, 661 (Tex. 2005); *Knott*, 128 S.W.3d at 215. A party moving for

---

<sup>2</sup> Leslie appeals the following sanction awards: \$69,000 against Leslie and Joe jointly and severally; \$6,000 against Leslie individually; \$30,000 against Joe individually; \$1,000 against Peter Ferraro individually; and \$3,500 against all three jointly and severally.

summary judgment must demonstrate that there is no genuine issue of material fact and that he is entitled to judgment as a matter of law. Tex. R. Civ. P. 166a(c); *Nixon v. Mr. Prop. Mgmt. Co.*, 690 S.W.2d 546, 548 (Tex. 1985). Where, as here, a defendant moves for summary judgment under the “traditional” standard, he must meet the initial burden of either conclusively negating at least one essential element of each of the plaintiff’s causes of action or conclusively establishing each element of an affirmative defense. *Science Spectrum, Inc. v. Martinez*, 941 S.W.2d 910, 911 (Tex. 1997).

~~If the defendant meets this initial burden, he is entitled to summary judgment unless the non-movant~~  
plaintiff presents summary-judgment evidence raising a genuine issue of material fact as to one of the elements at issue. *M.D. Anderson Hosp. & Tumor Inst. v. Willrich*, 28 S.W.3d 22, 23 (Tex. 2000) (per curiam). When reviewing a summary judgment, we take as true all evidence favorable to the non-movant, and indulge every reasonable inference and resolve all doubts in her favor. *Id.*; *Nixon*, 690 S.W.2d at 549.

A no-evidence motion for summary judgment must be granted if, after an adequate time for discovery, (1) the moving party asserts that there is no evidence of one or more essential elements of a claim or defense on which an adverse party would have the burden of proof at trial, and (2) the non-movant fails to produce more than a scintilla of summary-judgment evidence raising a genuine issue of material fact on those elements. Tex. R. Civ. P. 166a(i). A no-evidence summary judgment is essentially a directed verdict granted before trial, to which we apply a legal-sufficiency standard of review. *King Ranch, Inc. v. Chapman*, 118 S.W.3d 742, 750-51 (Tex. 2003); *Perdue v. Patten Corp.*, 142 S.W.3d 596, 603 (Tex. App.—Austin 2004, no pet.). A no-evidence summary judgment will be sustained when: (1) there is a complete absence of evidence

of a vital fact; (2) the court is barred by rules of law or of evidence from giving weight to the only evidence offered to prove a vital fact; (3) the evidence offered to prove a vital fact is no more than a scintilla; or (4) the evidence conclusively establishes the opposite of a vital fact. *King Ranch*, 118 S.W.3d at 751. We view the evidence in the light most favorable to the non-movant, disregarding all contrary evidence and inferences. *Id.* (citing *Merrell Dow Pharms., Inc. v. Havner*, 953 S.W.2d 706, 711 (Tex. 1997)). More than a scintilla of supporting evidence exists if the

~~evidence would allow reasonable and fair-minded people to differ in their conclusions. *Id.* “Less~~  
than a scintilla of evidence exists when the evidence is ‘so weak as to do no more than create a mere surmise or suspicion’ of a fact.” *Id.* (quoting *Kindred v. Con/Chem, Inc.*, 650 S.W.2d 61, 63 (Tex. 1983)).

As an initial matter, Leslie argues that the exclusion of certain summary-judgment evidence was improper. Rulings on the admission or exclusion of evidence are committed to the trial court’s sound discretion. *City of Brownsville v. Alvarado*, 897 S.W.2d 750, 753 (Tex. 1995). A trial court abuses its discretion if it rules without regard for any guiding rules or principles. *Id.* We uphold the trial court’s evidentiary ruling if there is any legitimate basis for the ruling. *Owens-Corning Fiberglas Corp. v. Malone*, 972 S.W.2d 35, 43 (Tex. 1998). Moreover, we will not reverse a trial court for an erroneous evidentiary ruling unless the error probably caused the rendition of an improper judgment. *See* Tex. R. App. P. 44.1; *see also* *Gee v. Liberty Mut. Fire Ins. Co.*, 765 S.W.2d 394, 396 (Tex. 1989). Thus, for the exclusion of evidence to constitute reversible error, the complaining party must show: (1) that the trial court committed error; and (2) that the

error was reasonably calculated to cause and probably did cause rendition of an improper judgment.

*McCraw v. Maris*, 828 S.W.2d 756, 757 (Tex. 1992).

Trial courts may exclude relevant evidence if its probative value is substantially outweighed by the danger of unfair prejudice, confusion of the issues, or misleading the jury. *See* Tex. R. Evid. 403; *State v. Malone Serv. Co.*, 829 S.W.2d 763, 767 (Tex. 1992). Here, on relevance grounds, the probate court excluded affidavits of C. Richard Chilleri and Michael Evans. Although

~~Leslie contends that the affidavits were improperly excluded; she cites to no legal authority to~~  
support her argument and no explanation as to any contents of the affidavits that were admissible or why. Leslie fails to explain or even address how she was harmed by the exclusion of the affidavits or how their exclusion probably caused the rendition of an improper judgment. Indeed, Leslie presents no argument on this point beyond her bare assertions that because the excluded evidence “deal[s] with the issues related to an error in the number of pages of the will admitted to probate,” the excluded testimony “would certainly be directly relevant to the ‘forgery’ claim” and would also “bear some relevance to the capacity of the person making the will.”

In addition to the Chilleri and Evans affidavits, the probate court excluded evidence attached to Leslie’s response to the motion for summary judgment on the Hamilton Pool property claim. Leslie’s challenge to the exclusion of this evidence states only that she “was not asserting a contract claim but an equitable claim and hence her evidence in support of that claim should not have been excluded.” She, likewise, asserts that the parol evidence rule does not apply because she was not asserting a contract claim. As to both assertions, however, Leslie neither offers further explanation nor cites to any legal authority.

Leslie similarly challenges the probate court's exclusion of certain summary-judgment evidence on hearsay grounds but, as argument, copies the text of the hearsay rule and states merely that "[t]he Court was in error" because "[e]ach of these statements meets an exception to the Hearsay rule." Leslie's challenges to the exclusion of summary judgment evidence attached to the summary judgment on her forgery and formalities claim and to the exclusion of evidence under the "Dead Man's Rule" are equally lacking in substance.

~~As to each of these evidentiary challenges, Leslie has presented neither argument nor~~  
authority to support her contention that the evidence was improperly excluded. Leslie has waived her evidentiary challenges on appeal. *See* Tex. R. App. P. 38.1. Even if Leslie had adequately briefed these points, a review of the record shows no abuse of discretion in the evidentiary rulings. *See* Tex. R. Evid. 402, 601, 802; Tex. R. App. P. 44.1; *Malone*, 972 S.W.2d at 43. Accordingly, we overrule Leslie's first issue.

As another threshold matter, Leslie argues that the probate court should have granted a continuance to allow additional time for discovery before hearing Danae's three summary-judgment motions. We review the trial court's denial of a motion for continuance under a clear-abuse-of-discretion standard. *Two Thirty Nine Joint Venture*, 145 S.W.3d at 161. A trial court abuses its discretion when it reaches a decision so arbitrary and unreasonable as to amount to a clear and prejudicial error of law. *BMC Software Belg., N.V. v. Marchand*, 83 S.W.3d 789, 800 (Tex. 2002).

~~The trial court may order a continuance of a summary-judgment hearing if it~~  
appears "from the affidavits of a party opposing the motion that he cannot for reasons stated present



by affidavit facts essential to justify his opposition.” Tex. R. Civ. P. 166a(g). We consider the following nonexclusive factors when deciding whether a trial court abused its discretion in denying a motion for continuance seeking additional time to conduct discovery: the length of time the case has been on file, the materiality and purpose of the discovery sought, and whether the party seeking the continuance has exercised due diligence to obtain the discovery sought. *Id.*; *Perrotta v. Farmers Ins. Exch.*, 47 S.W.3d 569, 576 (Tex. App.—Houston [1st Dist.] 2001, no pet.).

~~Leslie filed her original will contest on December 11, 2006. On August 6, 2007,~~  
Danae filed her first two motions for summary judgment as to testamentary capacity and failure to devise acreage, asserting both traditional and no-evidence grounds. Included with the motions served on Leslie was a notice setting the motions for hearing on August 28, 2007. On August 20, Leslie filed her motion for continuance, seeking additional time to conduct discovery. The probate court granted Leslie’s motion and reset the hearing for September 14, 2007. Although Leslie now contends that the length of the continuance was insufficient to allow time for additional discovery, the record does not show that any other motion for continuance was filed. Given that the continuance was granted and that no other motion for continuance was filed, there is no order or ruling below from which Leslie can appeal. *See* Tex. R. App. P. 33.1.

Nevertheless, Leslie argues that:

Although a short continuance was granted due to Appellant’s new counsel’s trial schedule, no continuance was granted to allow additional discovery concerning Mr. Durio’s medical condition. Under the circumstances failure to allow time for such additional discovery was an abuse of discretion.

Even if this were so, and even if Leslie had filed a second motion for continuance to preserve error, the probate court would have acted within its discretion in denying it. The probate code allows a party to a will contest based on testamentary capacity to subpoena medical records directly from medical providers. Tex. Prob. Code Ann. § 10b (West 2003). Leslie filed her original will contest on December 11, 2006, Danae filed her motions for summary judgment on August 6, 2007, and the summary judgments were heard on September 14, 2007. The record shows that Danae complied

~~with discovery requests for documents in her possession. Further, at any time during the intervening~~  
ten months, Leslie could have obtained Donn's medical records by issuing subpoenas directly to medical providers, as provided under the probate code. *See id.* Thus, even if Leslie had preserved error on this issue, the probate court would have acted within its discretion in denying Leslie's motion for continuance. *See Two Thirty Nine Joint Venture*, 145 S.W.3d at 161.

Leslie next moves to the merits of the summary-judgment motions, arguing first that the probate court erred in granting summary judgment as to testamentary capacity because there was insufficient evidence to establish Donn's testamentary capacity. Danae, as the will proponent, had the burden of proving Donn's testamentary capacity. *See Croucher v. Croucher*, 660 S.W.2d 55, 57 (Tex. 1983); *Long v. Long*, 196 S.W.3d 460, 464 (Tex. App.—Dallas 2006, no pet.). Testamentary capacity requires that the testator, at the time of execution of the will, have sufficient mental ability to understand he is making a will, the effect of making the will, and the general nature and extent of his property, know his next of kin and the natural objects of his bounty, and have sufficient memory to collect in his mind the elements of the business transacted and hold them long enough to perceive their obvious relation to each other and form a reasonable judgment about them.

*See Long*, 196 S.W.3d at 464; *In re Estate of Grimm*, 180 S.W.3d 602, 605 (Tex. App.—Eastland 2005, no pet.).

Danae proved testamentary capacity through affidavits, deposition testimony, and other documentary evidence. For example, Marianne, Donn's wife, testified that on June 16, 1994, the day that Donn executed his will, he "understood the business in which he was engaged (executing his will), the effect of making his will (that he was stating that his property would pass

~~upon his death as set forth in the will), [and] the general nature and extent of his property (for~~ example, the house in Westlake, the 15 acre tract)." The testimony of the witnesses to the will's execution, as well as the affidavit testimony of Donn's friends, neighbors, and former attorney, corroborate Marianne's testimony.

Once Danae, the summary-judgment movant, established her right to summary judgment, the burden shifted to Leslie, the nonmovant, to present evidence raising a fact issue. *See Willrich*, 28 S.W.3d at 23; *United Bus. Mach. v. Entertainment Mktg. Inc.*, 792 S.W.2d 262, 264 (Tex. App.—Houston [1st Dist.] 1990, no writ). In her response to Danae's motion, Leslie presented the affidavits of C. Richard Chilleri and Michael Evans. As explained above, however, the probate court excluded these affidavits on relevance grounds, and, on appeal, Leslie waived any complaint to their exclusion because of inadequate briefing. *See Tex. R. App. P. 38.1.*

Even if the affidavits had not been excluded, however, they provide no evidence of testamentary capacity. The affidavits address the page numbering in the will, not testamentary capacity. They provide little information beyond what could be gathered from an examination of the will itself. Both affiants state, for example:

I would not have signed as a witness on the original of the documents that are attached hereto as copies if I believed that I would be misstating the number of pages in the will.

The manner by which the will's pages were numbered and whether or not there were missing pages has no bearing on whether, at the time he executed the will, the undisputed summary-judgment evidence reflected that Donn understood what he was doing, understood the effect of what he was doing, knew the extent of his property, and knew his next of kin. *See Long*, 196 S.W.3d at 464; *In re Estate of Grimm*, 180 S.W.3d at 605. Because the affidavits, even if admitted, are no evidence of testamentary capacity, and because Leslie attached no other evidence to her summary-judgment response, she failed to raise a fact issue as to testamentary capacity.

On appeal, however, Leslie asserts that the summary-judgment record contains the following evidence in support of her argument that Donn lacked testamentary capacity:

1. Donn Durio had a drinking problem and drank regularly. His behavior when he drank was irrational.
2. The pages of his will were miss-numbered [sic] and there was some sort of cross out relating to the numbering of the pages which was also incorrect.
3. The Residuary Clause states conflicting contingent beneficiaries.
4. The will does not mention nor devise anything to Donn Durio's grandchildren, whom he loved.
5. The will miss-identifies [sic] his step-children.
6. The will does not bequeath anything to his daughters whom he loved.
7. The will does not devise or bequeath anything to Leslie Pool, the daughter with whom he shared the extremely traumatic loss [of her mother] and to whom he was especially close.

8. The will does not devise Helen Durio's personal possessions or sentimental property to either or her daughters but instead to Marianne Durio.
9. Yet the will devises a Rolex watch to Stephen Iler.
10. Decedent had a large estate, yet made no provisions for reduction of estate taxes.

Leslie points to no summary-judgment evidence to support her assertion that Donn had a drinking problem. As to her other points, for which she can rely on the will itself, none show that Donn lacked testamentary capacity. Donn defined his children by including his two biological children from his previous marriage to Helen and his four step children by marriage to Marianne. As testator, he can define his family and dispose of his property in any manner he chooses. *See* Tex. Prob. Code Ann. §§ 57, 58 (West 2003); *In re Estate of Clark*, 219 S.W.3d 509, 514 (Tex. App.—Tyler 2007, no pet.); *In re Estate of Morris*, 577 S.W.2d 748, 755 (Tex. Civ. App.—Amarillo 1979, writ ref'd n.r.e.) (“Neither courts, juries, relatives nor friends of a testator may say how property should be passed by a will or rewrite a will because they do not like the distribution of the property.”). While recognizing his children, Donn devised all of his property to his third wife of twenty-two years, Marianne. Devising all of one's property to one's spouse is commonplace and no indication of a lack of testamentary capacity, as Leslie contends. The absence of tax planning, the lack of any specific bequests, errors in page numbering, and a defective residual clause have no bearing on testamentary capacity. *See Long*, 196 S.W.3d at 464; *In re Estate of Grimm*, 180 S.W.3d at 605. Because Leslie failed to raise a fact issue as to testamentary capacity, we hold that the probate court did not err in granting summary judgment on this issue.

Leslie also argues that the probate court abused its discretion by granting summary judgment on Danae's claim to the 15-acre Hamilton Pool Road property. Leslie argues that the 15 acres were part of a constructive and/or resulting trust that was being held by Donn for the benefit of Leslie. According to Leslie, this "equitable claim was based on a number of factors including the close relationship and the fiduciary or confidential relationship that existed between Leslie and her father especially after the traumatic circumstances of her mother's death."

~~Leslie argues that summary judgment was based on the understanding that Leslie was~~  
asserting a contract claim and, because she was not asserting a contract claim, the court's ruling either did not dispose of her constructive trust claim or should not have disposed of her constructive trust claim. Although Leslie attempts to avoid summary judgment by specifically describing her claim as one for constructive/resulting trust, her argument is—in substance—that there was an oral agreement to devise the property. However she may describe the claim, Leslie's pleadings show that her claim is simply this: Donn made an oral promise to devise the 15-acres to her and to Danae. As a matter of law, an oral agreement to devise property otherwise disposed of in a will is unenforceable. Tex. Prob. Code Ann. § 59a (West Supp. 2009); *Taylor v. Johnson*, 677 S.W.2d 680, 681-82 (Tex. App.—Eastland 1984, writ ref'd n.r.e.). The probate court properly granted summary judgment on this issue.

Leslie next challenges Danae's third motion for summary judgment on the issue of forgery and formalities, filed on January 25, 2008. Danae's challenge to the propriety of the probate court's grant of summary judgment as to forgery and formalities begins with a challenge to the probate court's denial of her motion for continuance.

As noted, Leslie filed her will contest on December 11, 2006. Danae filed her motion for summary judgment as to Leslie's forgery and formalities claim on January 25, 2008, over a year later. The hearing was set on March 6, 2008, and Leslie filed her motion for continuance on March 4, 2008. Although the probate court denied Leslie's motion, it granted leave for—and considered—her late-filed response and attached evidence. Leslie had forty-one days between the time the summary judgment motion was filed and the hearing, twenty days more than the twenty-

~~one days required by rule. See Tex. R. Civ. P. 166a(c).~~ In addition, the probate court granted Leslie's motion for leave to file a late response and overruled Danae's timeliness objections to Leslie's attached evidence. In these circumstances, we find no abuse of discretion in the denial of the motion for continuance. See *Two Thirty Nine Joint Venture*, 145 S.W.3d at 161.

As to the merits of the motion, we, likewise, find no error. Because the will was self-proved under the probate code, Leslie bore the burden of proof on the issue of forgery. See Tex. Prob. Code Ann. § 84(a); *Tomlinson v. Estate of Theis*, No. 03-07-00123-CV, 2008 Tex. App. LEXIS 372, at \*19 (Tex. App.—Austin Jan. 18, 2008, no pet.) (memo op.). Thus, to defeat Danae's no-evidence motion, Leslie would have had to produce summary-judgment evidence raising a genuine issue of material fact in support of her claim that Donn's will had been forged or not properly executed. See *id.*; Tex. R. Civ. P. 166a(i).

As evidence sufficient to raise a fact issue that the will is either a forgery or not executed with the required formalities, Leslie points us to the "face of the will." Specifically, Leslie points out the following:

1. The number of pages is identified as 5 above the signature, there are not that many pages;
2. The number of pages are crossed out and re-entered, the number crossed out appears to be a 3, there are not that many pages above the signature line;
3. Page one evidences conflicting residual beneficiaries;
4. The children were improperly identified;
5. The signatures by the witnesses to the will attest to an incorrect number of pages;
6. There is a faint print of additional words on the will page one that overlap the provision of the will but are not located on any other page of the will indicating that the "original" of page one was copied and may have been a substitute;
7. The purported will has no specific property disposition except for a Rolex watch nor does it list any property he previously conveyed;
8. The purported will has a different first page than the will of Marianne Durio which was alleged to have been executed in the same manner and at the same time as the purported will;
9. The purported will has no provision for taxes;
10. The will effectively devises in excess of two to three million dollars without naming anything but a Rolex watch.
11. Appellee made no attempt to explain or document approval and acknowledgment of the changes or alterations.
12. There is neither Testator signature nor his initials on Purported Will Page 1.
13. The Purported Will does not match or dovetail in with the rest of the Purported Will in content and headings numbering.

We agree with the probate court that the evidence presented by Leslie is insufficient to raise a fact issue on her forgery and formalities claim. As evidence that the will was forged or not properly



executed, Leslie offers nothing more than some typographical errors and her own belief that the manner in which Donn chose to dispose of his property was unreasonable. Leslie's evidence is little more than a list of her own suspicions that lead her to conclude that the will might be a forgery. Such evidence is insufficient to create a fact issue. See *King Ranch, Inc.*, 118 S.W.3d at 750-51 (quoting *Kindred*, 650 S.W.2d at 63) ("Less than a scintilla of evidence exists when the evidence is 'so weak as to do no more than create a mere surmise or suspicion' of a fact."); *Browning-Ferris,*

*Inc. v. Reyna*, 865 S.W.2d 925, 928 (Tex. 1993) (appellate courts "are not empowered to convert mere suspicion or surmise into some evidence"). Accordingly, we overrule Leslie's fourth issue.

In issues five through fifteen, Leslie argues that the court erred in imposing sanctions for filing the following with the probate court: testamentary capacity and undue influence claims (\$40,000), Hamilton Pool property claim (\$30,000), defamation claim (\$7,000), forgery and formalities claim (\$20,000), motions to compel and to set aside (\$4,000), affidavits incorporated by reference into summary-judgment response (\$5,000), and claims involving Stephen Iler (\$3,500). The probate court issued sanctions pursuant to Rules 13 and 215 of the Texas Rules of Civil Procedure, and chapter 10 of the civil practice and remedies code. See Tex. R. Civ. P. 13, 215; Tex. Civ. Prac. & Rem. Code Ann. §§ 10.001-.006 (West 2002).

We confine our review of a sanctions order to the grounds specified by the trial court. See *Unifund CCR Partners v. Villa*, 299 S.W.3d 92, 94 n.1 (Tex. 2009); *American Flood Research, Inc. v. Jones*, 192 S.W.3d 581, 583-84 (Tex. 2006); *Finlay v. Olive*, 77 S.W.3d 520, 524 (Tex. App.—Houston [1st Dist.] 2002, no pet.); *Metzger v. Sebek*, 892 S.W.2d 20, 51 (Tex. App.—Houston [1st Dist.] 1994, writ denied). Rule 13 provides, in relevant part:

The signatures of attorneys or parties constitute a certificate by them that they have read the pleading, motion, or other paper; that to the best of their knowledge, information, and belief formed after reasonable inquiry the instrument is not groundless and brought in bad faith or groundless and brought for the purpose of harassment.

\* \* \*

“Groundless” for purposes of this rule means no basis in law or fact and not warranted by good faith argument for the extension, modification, or reversal of existing law.

When determining whether to sanction under Rule 13, the trial court must examine the facts that were available and the circumstances existing when the party filed the challenged pleading, motion, or other paper. *Elkins v. Stotts-Brown*, 103 S.W. 3d 664, 668 (Tex. App.—Dallas 2003, no pet.); *Estate of Davis v. Cook*, S.W.3d 288, 297 (Tex. App.—San Antonio 1999, no pet.); *Emmons v. Purser*, 973 S.W.2d 696, 700 (Tex. App.—Austin 1998, no pet.).

Rule 215 allows a court to impose sanctions for discovery abuse, Tex. R. Civ. P. 215, and chapter 10 of the civil practice and remedies code allows sanctions for filing a pleading or motion “for any improper purpose, including to harass or to cause unnecessary delay or needless increase in the cost of litigation,” Tex. Civ. Prac. & Rem. Code Ann. § 10.001.

We review a trial court’s imposition of sanctions for an abuse of discretion. *See American Flood Research, Inc.*, 192 S.W.3d at 583; *Cire v. Cummings*, 134 S.W.3d 835, 838 (Tex. 2004). An appellate court may reverse the trial court’s ruling only if the trial court acted without reference to any guiding rules and principles, such that its ruling was arbitrary or unreasonable. *Cire*, 134 S.W.3d at 838-39.

In deciding whether the imposition of sanctions constitutes an abuse of discretion, we examine the entire record, including the findings of fact and conclusions of law, reviewing the conflicting evidence in the light most favorable to the trial court's ruling and drawing all reasonable inferences in favor of the court's judgment. *In re C.Z.B.*, 151 S.W.3d 627, 636 (Tex. App.—San Antonio 2004, no pet.). As fact finder, the trial court is entitled to evaluate the credibility of the testimony and determine what weight to give it. *Alpert v. Crain, Caton, & James, P.C.*, 178 S.W.3d 398, 412 (Tex. App.—Houston [1st Dist.] 2005, pet. denied). We reverse a decision to impose sanctions only if “the order is based on an erroneous view of the law or a clearly erroneous assessment of the evidence.” *Loeffler v. Lytle Indep. Sch. Dist.*, 211 S.W.3d 331, 347-48 (Tex. App.—San Antonio 2006, pet. denied).

Leslie first argues that the probate court abused its discretion by awarding sanctions on April 21, 2008, after final judgment had already been entered on April 2, 2008. A trial court retains jurisdiction over a case for a minimum of thirty days after signing a final judgment. Tex. R. Civ. P. 329b(d). During this time, the trial court has plenary power, and this plenary power includes the authority to act on a motion for sanctions. *Lane Bank Equip. Co. v. Smith S. Equip., Inc.*, 10 S.W.3d 308, 310-11 (Tex. 2000); *Scott & White Mem'l Hosp. v. Schexnider*, 940 S.W.2d 594, 596 (Tex. 1996). Here, the probate court imposed sanctions on April 21, 2008, nineteen days after it rendered final judgment. The probate court acted within its authority by issuing the sanction award before the expiration of its plenary power. *See id.* Accordingly, we overrule Leslie's fifth issue.

Finding that the probate court retained jurisdiction to issue sanctions, we next consider Leslie's appeal of sanctions as to her claims for testamentary capacity and undue influence, acreage, defamation, and forgery and formalities. As to each of these sanction awards, Leslie argues that the probate court abused its discretion because "[t]here are no sanctions for improperly 'maintaining' a claim," because there was evidence to support each of these claims, because she sought and was denied discovery that could have supported these claims, and because there is no evidence that she acted in bad faith.

Leslie first asserts that, while there may be sanctions under Rule 13 for bringing a claim, there are no sanctions for "maintaining" a claim. Contrary to Leslie's assertions, for which she cites no authority, it is well-settled that a party acts in bad faith at any time he maintains a claim by continuing to actively pursue that claim after discovery puts him on notice that the claims he is asserting are groundless. *See, e.g., Monroe v. Grider*, 884 S.W.2d 811, 817-18 (Tex. App.—Dallas 1994, writ denied). Even before Leslie filed suit, the evidence showed that her claims were groundless; however, the probate court expressly found Leslie's claims were not groundless *ab initio*. Rather, the probate court found, and the record confirms that, as early as April 13, 2007, discovery revealed that these claims were, indeed, groundless. The Pools actively pursued these claims—filing amended pleadings and other papers—until the claims were finally disposed of by nonsuit or summary judgment on September 14, 2007.

Leslie next asserts that her claims are not frivolous because there was, in fact, evidence to support them. Leslie cites to no evidence to support this assertion, however, and

the record shows that the opposite is true—that there was no factual or legal basis to support any of her claims.

As to Leslie's testamentary capacity and undue influence claims, the record includes testimony from Leslie, through which she concedes that she neither questioned Donn's capacity nor contended that he was being unduly influenced until she read his will and learned that he had left everything to his third wife, Marianne, and nothing to her. Further, Leslie testified that, before filing

~~the will contest, Leslie obtained medical records for Donn, none of which showed any evidence of~~

lack of testamentary capacity. In addition, on April 13, 2007, Joe Pool testified that it appeared to him that Leslie had no basis on which to assert her testamentary capacity and undue influence claims.

Finally, Leslie's argument that the will itself supports her testamentary capacity and undue influence claims has no basis in law or fact. As previously discussed, Donn's recognition of his stepchildren as part of his family is his prerogative as testator. *See* Tex. Prob. Code Ann. §§ 57, 58; *In re Estate of Clark*, 219 S.W.3d at 514; *In re Estate of Morris*, 577 S.W.2d at 755. Further, Donn's decision to leave all of his property to his wife of twenty-two years is commonplace. And, as noted above, the absence of tax planning, the lack of any specific bequests, errors in page numbering, and a defective residual clause have no bearing on testamentary capacity. *See Long*, 196 S.W.3d at 464; *In re Estate of Grimm*, 180 S.W.3d at 605.

Beyond the will itself and her own bare assertions, Leslie had no evidence to support her testamentary capacity and undue influence claims. Had Leslie and her lawyers conducted a reasonable inquiry into the law and the facts surrounded the will contest, they would have learned that their claims had no basis in law or fact. *See* Tex. R. Civ. P. 13. By mid-April 2007, despite

Leslie's and her attorneys' own acknowledgment that they had no basis by which to maintain these claims, and despite Danae's repeated requests to Leslie and her attorneys to dismiss these claims based on evidence that the claims were groundless, Leslie and her attorneys refused to do so. On September 14, 2007, the probate court disposed of the testamentary capacity claim by summary judgment and, on the same day, Leslie nonsuited her undue influence claim.

As to her claim for testamentary capacity, Leslie also argues that she "sought and was ~~denied medical records which could have been evaluated to either support the claim or better educate~~ [her] as to Donn Durio's condition and its effects." As discussed above, however, the record shows that Danae complied with Leslie's discovery requests. Further, to the extent Leslie believed that documents had not been provided, she could have served Donn's medical providers with subpoenas to obtain these documents. *See* Tex. Prob. Code Ann. § 10B. In addition, at the hearing on the motion for sanctions, Leslie admitted that she had obtained Donn's medical records before filing the will contest, and had found no evidence showing a lack of testamentary capacity.<sup>3</sup>

- 
- <sup>3</sup> Q. My question to you was before you filed the lawsuit did you get any medical records about your father around the—dealing with the timeframe of 1994?
- A. Yes, we did.
- Q. Okay. And did any of those medical records support your claim that he lacked capacity in 1994?
- A. No. No, they didn't but I don't believe they're all there.
- Q. Okay. And did you—did any of those medical records support your claim that Donn was or could have been unduly influenced in 1994?
- A. No, because none of them told me any information I needed to know.

As to Leslie's claim for the Hamilton Pool Road property, Leslie argued that Donn had agreed to hold the property until his death and then devise it through his will to his daughters, Leslie and Danae. Not only does the record evidence contradict Leslie's factual allegation, but, even if true, Leslie's acreage claim is barred as a matter of law by section 59A of the probate code. *See* Tex. Prob. Code Ann. § 59A. A reasonable investigation into the applicable law would have shown as much. *See* Tex. Civ. Prac. & Rem. Code Ann. § 10.001(2). Again, despite Danae's repeated requests to Leslie and her attorneys to nonsuit her acreage claim, Leslie included the claim in her September 7, 2007 second amended will contest. The probate court disposed of Leslie's acreage claim by order of summary judgment on September 14, 2007.

Leslie's defamation claim also has no basis in law or fact. *See* Tex. R. Civ. P. 13. On April 13, 2007, Joe Pool testified that Leslie was no longer asserting the defamation claim and that she had instructed him to drop the claim from the suit. However, the claim was not dropped, despite six letters from Danae requesting that the claim be dropped and notifying Leslie that sanctions would be sought if the claim was not dropped. Indeed, the defamation claim was included in the September 7, 2007 second amended will contest. Even if the claim's inclusion in the second amended will contest was an oversight, as Leslie's attorney asserts, we agree with the probate court that the attorney "should have paid closer attention to the letters from opposing counsel complaining of the continuation (or origination) of the Defamation Claim and should have had his client, Ms. Pool, immediately dismiss the Defamation Claim." Not until March 2008 did Leslie voluntarily nonsuit the defamation claims, and the probate court affirmed the nonsuit with prejudice by order on March 6, 2008.

Leslie's forgery and formalities claim, likewise, had no basis in law or fact. *See id.*

As previously discussed, because Donn's will was self-proved, Leslie had the burden of presenting some evidence that it was a forgery or that it did not comply with formalities. *See* Tex. Prob. Code Ann. § 84(a); *Tomlinson*, 2008 Tex. App. LEXIS 372, at \*19. Leslie offered no evidence to support her claim beyond a list of her own suspicions that led her to conclude that the will might be a forgery, suggesting specifically that the absence of a page number on the first page, the absence of

~~initials on any of the pages, and the failure of the will to flow, indicated that the will was a forgery.~~

Through discovery, rather than gathering evidence to support her claim, Leslie definitively learned that her claims had no basis in law or fact. When deposed, Marianne testified that she and Donn prepared and executed their wills together. A comparison of the two wills shows that they are mirror images, each spouse devising his or her estate to the other. Further, a computer forensic examiner's analysis of the software used by Donn and Marianne to create their wills showed that the software had been used a few weeks before the wills were executed. Further, information stored provided a replication of the drafts that were ultimately executed by Donn and Marianne a few weeks later. In addition, two days after Donn and Marianne executed their wills in 1994, Donn mailed copies of both wills to Danae. A comparison of the copies originally sent to Danae with the will that was offered for probate show that nothing in the will offered for probate had been removed, substituted, or altered in any way. Despite having learned that no evidence supported her claim but, rather, supported the conclusion that Donn's will was not a forgery and complied with formalities, and despite repeated requests by Danae to nonsuit the claim, Leslie persisted in maintaining the



forgery and formalities claim in each of her amended will contests until it was disposed of by order of summary judgment on March 6, 2008.

Finally, as to all of these claims—testamentary capacity and undue influence, acreage, defamation, and forgery and formalities—Leslie argues that there is no evidence that she acted in bad faith. As discussed above, however, the evidence shows that Leslie’s arguments were groundless both legally and factually and that, by at least mid-April 2007, both Leslie and her

~~attorneys were aware that their claims were groundless. We agree with the probate court that “[t]he~~

bad faith maintenance of [these claims] caused a needless increase in the cost of litigation fees and expenses, and caused substantial damage to [Danae] and [Marianne].” The probate court also expressly found that

the amounts in sanctions [are] reasonable to punish Ms. Pool and her lawyers for their sanctionable conduct, to deter further abuses, and to compensate Ms. Diana [Danae] and Ms. Durio [Marianne] for the substantial damage they have incurred as a result of that conduct. The court considered lesser sanctions but believes these sanctions are just and appropriate.

Accordingly, we hold that the probate court acted within its discretion in issuing sanctions for the filing of claims for testamentary capacity and undue influence, acreage, defamation, and forgery and formalities, and overrule Leslie’s issues eight through twelve. *See Loeffler*, 211 S.W.3d at 347-48 (an order imposing sanctions will be reversed on appeal only if “the order is based on an erroneous view of the law or a clearly erroneous assessment of the evidence”); Tex. R. Civ. P. 13; Tex. Civ. Prac. & Rem. Code Ann. § 10.001.

In her sixth and seventh issues, Leslie argues that the trial court abused its discretion in issuing sanctions against her for filing her motion to compel and her motion to set aside sanctions. As argument, Leslie states merely that “[t]here is no doubt that Appellant was entitled to such documents” and that “[t]here is no evidence of evil intent or frivolous or abusive discovery.” Again, Leslie cites neither to evidence nor to legal authority. A review of the record shows that Leslie sought to compel discovery based on inapplicable discovery provisions, repeatedly sought documents ~~in contravention of a signed Rule 11 agreement to suspend discovery pending settlement discussions,~~ and continually harassed Danae and Marianne for documents, despite their cooperation in producing the documents in their possession. The probate court acted within its discretion in concluding that Leslie’s filing of the motion to compel and the subsequent motion to set aside were filed in bad faith or for purposes of harassment. *See* Tex. R. Civ. P. 13, 215; *American Flood Research, Inc.*, 192 S.W.3d at 583; *see also* Tex. R. Civ. P. 215.1(d).

In her thirteenth issue, Leslie challenges the probate court’s order of sanctions for the filing of the Chilleri and Evans affidavits. Leslie again cites to no authority to support her position but argues that filing the affidavits was not sanctionable conduct because the affidavits “were not proven to be false” and because “there is no evidence that these affidavits were filed in bad faith.” The record, however, shows otherwise. Chilleri and Evans testified on multiple occasions that, even before they signed the affidavits, they told Joe Pool, Leslie’s attorney, that they had no personal knowledge of how many pages were in the will or whether any pages had been substituted or were missing. Even in the face of this testimony, in her March 6, 2008 summary-judgment response, Leslie attached the affidavits and wrote:

C. Richard Chilleri and Michael Evans testify in their affidavits that the Purported Will that has been filed by Proponent is Missing Pages. . . . The affidavits of C. Richard Chilleri and Michael Evans further state that the page numbering has changed on the pages filed as the Purported Will of Decedent.

Such an assertion was not only improper following the testimony of the affiants disavowing any personal knowledge of the page numbering, but was also a misrepresentation of the express content of the affidavits themselves. In light of the evidence, Leslie had no factual or legal basis for filing

~~her March 6 summary judgment response, incorporating by reference the Chilleri and Evans~~

affidavits. Accordingly, we find no abuse of discretion in the probate court's order of sanctions and overrule Leslie's thirteenth issue. *See* Tex. R. Civ. P. 13; Tex. Civ. Prac. & Rem. Code Ann. § 10.001; *American Flood Research, Inc.*, 192 S.W.3d at 583.

In her fourteenth and fifteenth issues, Leslie challenges the probate court's award of sanctions with respect to Stephen Iler, Donn's stepson and Marianne's biological son. The will's only specific bequest was a Rolex watch to Iler. Iler filed a disclaimer of his interest in the Rolex watch on March 23, 2007. Because Iler was a beneficiary, Leslie included Iler in her original will contest, filed on December 11, 2006, as well as in her first and second amended contests, filed on March 6, 2007 and September 7, 2007, respectively. Despite Iler's repeated requests for voluntary dismissal from the suit, given that he had no interest in the estate after March 23, 2007, Leslie refused and, indeed, affirmatively included Iler as a party in her second will contest, filed on September 7, 2007. In addition, on November 16, 2009, Leslie propounded discovery on Iler. On November 26, 2007, Iler filed his motion to dismiss and for sanctions for failure to dismiss him from the will contest, along with a motion for protection from discovery. On December 4, 2007, the

probate court signed orders granting Iler's motion to dismiss and imposing sanctions totaling \$3,500 on Leslie and her attorneys.<sup>4</sup>

We find no abuse of discretion in the probate court's determination that, following Iler's disclaimer, filed on March 23, 2007, and his repeated requests for a voluntary nonsuit, Leslie's failure to dismiss him and her discovery requests to him were solely for purposes of harassment. *See* Tex. R. Civ. P. 13, 215. Given that Iler had no interest in the estate after March 23, 2007, Leslie's

~~inclusion of Iler in her second amended will contest and Leslie's discovery requests to Iler had~~  
no basis in law or fact. *See id.* We find no error in the probate court's sanction awards as to Stephen Iler and, accordingly, overrule Leslie's fourteenth and fifteenth issues. *See Loeffler*, 211 S.W.3d at 347-48.

As a final matter, both Leslie and Danae have filed motions for penalties with this Court. Danae has requested penalties in the amount of \$30,000 against Leslie and her counsel, and Leslie has requested penalties in the amount of \$15,000 against Danae and her counsel. As discussed in detail above, we have found no abuse of discretion in the probate court's award of sanctions for Leslie's filing of frivolous and groundless claims and pleadings. On appeal, even as Leslie continues to defend the merits of these claims, her briefing is virtually devoid of any legal or evidentiary authority. To the extent that she does cite to authority, that authority is, at best, inapplicable or irrelevant and, at worst, incorrect. As Leslie continues to pursue her groundless claims, Danae has been forced to defend her position, resulting in ever-mounting attorney's fees

---

<sup>4</sup> Although, in their briefing here, the parties state that Iler was voluntarily dismissed after Iler filed his motion on November 26, 2007, the record before us shows only that Iler was dismissed by order of the probate court on December 4, 2007.

as well as a significant delay in the administration of Donn's estate—and a waste of judicial resources. Given these circumstances, we grant Danae's motion for penalties and deny Leslie's.

Having overruled each of Leslie's issues, we affirm the judgment of the probate court.

We grant Danae's motion for penalties and deny Leslie's motion for penalties.

---

Bob Pemberton, Justice

Before Justices Patterson, Pemberton and Waldrop;  
Concurring and Dissenting Opinion by Justice Patterson

Affirmed

Filed: March 24, 2010

# **App. C**

**TEXAS COURT OF APPEALS, THIRD DISTRICT, AT AUSTIN**

---

**JUDGMENT RENDERED MARCH 24, 2010**

---

---

**NO. 03-08-00363-CV**

---

**Leslie Durio Pool, Appellant**

**v.**

**Danae Durio Diana, Appellee**

---

**APPEAL FROM PROBATE COURT NO. 1 OF TRAVIS COUNTY  
BEFORE JUSTICES PATTERSON, PEMBERTON AND WALDROP  
AFFIRMED -- OPINION BY JUSTICE PEMBERTON;  
CONCURRING AND DISSENTING OPINION BY JUSTICE PATTERSON**

---

**THIS CAUSE** came on to be heard on the record of the court below, and the same being considered, because it is the opinion of this Court that there was no error in the probate court's judgment: **IT IS THEREFORE** considered, adjudged and ordered that the judgment of the probate court is in all things affirmed. It is **FURTHER** ordered that appellant pay penalties in the amount of \$30,000; and that the appellant pay all costs relating to this appeal, both in this Court and the court below; and that this decision be certified below for observance.